NEXT ANNUAL MEETING WILL BE HELD AT DETROIT, SEPTEMBER 2-4

AMERICAN BAR ASSOCIATION

JOVRNAL

JUNE, 1925

VOL. XI Price: Per Copy, 25c; Per Year, $3; To Members, $1.50 No. 6
Published Monthly by The American Bar Association at 1612 First National Bank Building, 38 South Dearborn Street, Chicago, Illinois
Entered as second class matter Aug. 25, 1920 at the Post Office at Chicago, Ill., under the Act of Aug. 24, 1912.

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TABLE OF CONTENTS

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The Detroit Meeting

ARRANGEMENTS for the Detroit meeting are well under way, the committee of the local bar co-operating enthusiastically with the committee of the American Bar Association to make this one of the most successful meetings in the history of the organization. We are printing in this issue a tentative program of the meeting and certain announcements respecting the meetings of the sections and allied bodies. The list of speakers for the Association is not yet complete, but members may be assured that it will measure fully up to expectations. We trust to be able to give it in the next issue of the JOURNAL. As is the custom one of the sessions of the main body will be devoted to a joint meeting with the State Association. The recreation features will be all that could be desired, Detroit being particularly well situated to furnish them and the climate in that region in the early part of September being admirably adapted to permit of their enjoyment. One of these features will be an all-day trip to Ann Arbor as guests of the Michigan State Bar Association and the Detroit Bar Association, thus affording members an opportunity to inspect the beautiful buildings of the Lawyers Club about which mention has been made several times in the JOURNAL.

For the convenience of members who contemplate attending the Detroit meeting on September 2, 3, and 4, we are printing in another part of this issue a list of the hotels in that flourishing city, with the rates charged for accommodations. All are situated within a reasonable distance of the hotel, which will be headquarters, and of the Cass Technical School in which the meetings of the Association will be held. Those who wish to make their reservations in advance in order to secure satisfactory selections—and this is usually a wise thing to do—are asked to address themselves to Oscar C. Hull, Chairman Committee on Reservations, Dime Savings Bank Building, Detroit, Michigan.

Committee on Scope and Plan to Meet

THE Special Committee of the American Bar Association on Scope and Plan will have a hearing at The Chicago Bar Association, 160 North La Salle Street, Chicago, on Tuesday, June 30th, 1925, at ten o'clock A. M., to consider proposed amendments to the By-Laws defining the jurisdiction of the Standing and Special Committees, particularly the Committee on Commerce, Trade and Commercial Law, and the Special Committee on Practice in Bankruptcy Matters. The Special Committee will also consider the proposal to amend the Constitution and create a Section on Commercial Law and Bankruptcy. The Special Committee is composed of Chester I. Long of Wichita, Kan., as Chairman, Frederick A. Brown of Chicago and Judge William M. Hargest of Harrisburg, Pennsylvania. It was appointed by the Executive Committee at its meeting in Atlanta in January. The Executive Committee at its meeting in New York City on the 27th of April authorized it to hold this meeting in Chicago.

Governor Defeats California Self-Governing Bar Bill

GOVERNOR Friend W. Richardson of California has refused to sign the self-governing bar bill passed at the recent session of the legislature. He sets forth the reasons for his refusal in the following brief statement:

"This bill proposes to establish a self-governing association of lawyers which will in no way be responsible to the State, except that its members will continue as officers of the court and be amenable to them. It levies upon each licensed lawyer a tax of $5 per year, which may be increased to $10,

default in the payment of which forfeits his license, and if thereafter he attempts to practice, authorizes his prosecution for misdemeanor.

"I have received many letters from members of the bar concerning the bill, from which I conclude that the profession is divided in its support. Among the opponents are several former judges who doubt its efficacy in producing the results desired. Without attempting to analyze the arguments, both practical and legal, which have been presented, it is sufficient to say that in my judgment a measure which ties the entire legal profession in an organization which is not a part of the state government, whose funds are not budgeted and over whose operations the state has no control, and which authorizes it to apply such drastic punishment for disobedience of its rules, should not become a law, at least not unless it has received the unanimous support of the bar. It is, therefore, enough for me to know that such support is wanting.

"I am in favor of all efforts to purify the legal and other professions and I have the utmost respect for the promoters of this measure, especially for the bar associations which have endorsed it. But after weeks of study I am forced to the conclusion that it is my duty to withhold my signature from this bill. No harm can result, for existing laws provide ample means for disciplining members of the bar who fail in their duty."

Jurors Would Welcome Judge's Aid

A QUESTIONNAIRE sent out to the members of the County Attorneys' Association of Nebraska resulted in valuable information and suggestions as to the administration of criminal law, according to the annual address of Hon. Bert N. Hardenbrook, of Ord, Nebraska, president of the organization, at the annual meeting in January. In that address he made the following pertinent observations on a question of growing importance:

"As a rule Judges are not asking for additional power but it seems to me that the present method of written instructions could be improved upon in the furtherance of justice. Why not allow the trial judge as in Federal Court, more latitude in giving and explaining to the jury what the law is and to comment on what is the best of evidence. The trial judge is handicapped under the present procedure and the Court often criticised. I am of the opinion that more intelligent verdicts would be rendered and fewer mis-trials if more authority were given our Judges. The result of our questionnaire indicates that jurors would welcome that assistance from the Judge and they should be entitled to any assistance that the Court can furnish."

Meetings of Practice in Bankruptcy Committee

A MEETING of the Special Committee on Practice in Bankruptcy Matters of the American Bar Association, consisting of Simon Fleischmann of Buffalo, N. Y., Chairman, and Harold F. White of Chicago, Ill., Henry S. Drinker Jr. of Philadelphia, Pa., Wilbur H. Cherry of Minneapolis, Minn., and Edwin C. Brandenburg of Washington, D. C., was called at Atlanta on January 12th and 13th last, contemporaneously with the meeting of the Executive Committee and of other Committees of the Association. The only members of the Bankruptcy Committee who attended in Atlanta were Mr. Fleischmann and Mr. White. Two days were devoted to examining material which had been collected, and in formulating suggestions for further consideration by the Committee.

Another meeting was held at Washington on February 11th, which was attended by Messrs. Fleisch-

mann, White, Drinker and Brandenburg. A profitable day was spent in analyzing data and, especially, in considering certain new General Orders in Bankruptcy, which had been recommended to the Supreme Court of the United States, for adoption, by the Council of United States Circuit Court Judges. These proposed Orders have for their purpose the elimination, or at least, amelioration of abuses in the administration of the Bankruptcy Act, which are the object of complaint from various sources.

Our Special Committee formulated certain modifications of these orders, and arranged a conference with Chief Justice Taft, at his hospitable home, and with Associate Justices Sanford and Brandeis, who had been designated as a committee of the Court to take charge of this matter, in the first instance. The four members of our Committee joined in the conference with these Justices, which was in every way pleasant and interesting. A discussion of the various points which arose, was had, and at its close the Justices stated that they would give careful consideration to our Committee's proposed amendments of the General Orders.

On April 13, 1925, the Supreme Court announced its action upon the General Orders in Bankruptcy, by amending General Order in Bankruptcy No. 5, and putting into effect new and additional Orders numbered 39 to 45 inclusive, which are now operative, and which embody, more or less, the recommendations of our Special Committee of the American Bar Association. Our Committee believes that these new orders will, of themselves, bring about desirable improvements and elimination of evils in the practice and administration of the Bankruptcy Law, the full extent of which cannot be estimated at this time, but will be revealed in the future, by their application.

The agitation for improvement in the Bankruptcy Law and practice has, for the past few years, attracted increasing attention, and by a growing number of associations, both legal and commercial throughout the country. As an evidence of this may be mentioned the conference called for April 23rd, at the Association of the Bar of the City of New York, preceded by a dinner at the Harvard Club, by the National Association of Credit Men, to which representatives of the Merchants' Association of New York, the Association of the Bar of the City of New York, the Commercial Law League of America, the National Association of Credit Men, the New York County Bar Association of New York, the American Bar Association, and other organizations, were invited to give their views.

SIMON FLEISCHMANN, Chairman.

Veteran Federal Judge Retires

JUDGE ERSKINE M. ROSS, of the U. S. Circuit Court of Appeals for the Ninth Circuit, recently retired at the age of 79, after 38 years of service upon the federal bench. Judge Ross was appointed U. S. District Judge for the Southern District of California by President Cleveland in 1886. He served in that position until 1895, when he was appointed a U. S. Circuit Judge for the Ninth Circuit, which position he filled until 1912, when he became a judge of the U. S. Circuit Court of Appeals. In response to Judge Ross' request for retirement President Coolidge sent him the following letter:

April 1, 1925.

The White House, Washington.

My Dear Judge Ross: Your request for retirement as Circuit Judge for the Ninth Circuit, in view of your long and notable service leaves me no alternative but to acquiesce in your wishes. I therefore accept your suggestion concerning retirement, and in doing so feel constrained to refer, even if all too briefly, not only to the record on which you deserve commendation, but also to the high place that you have earned among members of the federal judiciary in your time.

It is now approaching the end of the half century since you were called to the federal bench. During that long period your performance of many and difficult duties has been marked by an ability, courage and determination which have repeatedly won the highest testimonies. It has been your fortune to confront on different occasions conditions which required, in the discharge of your duties, the highest qualities of learning, wisdom, moderation and great firmness. In these you have never failed, but rather have repeatedly demonstrated a particularly exalted character and a thorough-going realization of the place which the judiciary must occupy under our system of government.

As you are now retiring after so long and distinguished a career, I wish you to know of my regret that your service is to be terminated, and of my confidence that your record will long stand as a memorial to a just and fearless and able judge. That you may be privileged for many years to enjoy the regards which such service has so well earned for you is my earnest wish.

Very truly yours,
CALVIN COOLIDGE.

The New Solicitor General

MR. WILLIAM D. MITCHELL, of St. Paul, was named Solicitor General by President Coolidge on June 5, to succeed Mr. Beck, who retired after many years of distinguished service in that important position. Mr. Mitchell is taking public office for the first time, and his friends and sponsors are fully assured that he will maintain the tradition of ability and efficiency which has been for so many years associated with the position of Solicitor General. He is 51 years of age and senior member of the law firm of Mitchell, Doherty, Rumble, Bunn and Butler. He was one of the first men to be suggested to the President when it was learned that Mr. Beck was to retire. In addition to his distinction as a lawyer, Mr. Mitchell has to his credit that he served both in the Spanish-American and the World War. By a fortunate coincidence we are able to present to our readers in this issue an article by the new Solicitor-General on "The Capitalization of Corporations Issuing Shares Without Par Value."

Misdirected Mail

WE associate ourselves fully with the feeling of Postmaster-General New against the waste and carelessness caused by misdirected mail, as evidenced in the recent "Better Mailing Week" and the flood of publicity attending it. Mr. New's reproachful statistics are directed properly enough against the writer who fails to put a sufficient direction on his missive or fails to write it legibly. The JOURNAL's difficulties in regard to misdirected mail are probably those of most other periodicals, and they consist in the fact that the subscriber, after giving a perfectly good address, often subsequently changes his office without due notification and without due forwarding instructions, and is thereupon astonished, and sometimes not a little indignant, that his JOURNAL does not seek him out in his new location. Another difficulty arises from the fact that members of firms and of other organizations whose individual names do not appear on the directory of the building often simply give a large office building as their address, relying on the postman to ferret out their location in the building and deliver the JOURNAL.

THE THEORY OF JUDICIAL DECISION: OR HOW JUDGES THINK

Legal Experience Furnishes Mind With Many Type Situations or Categories to Which New Situations Are Naturally Assimilated—In Case of Struggle Among the Categories for Primacy, the One Leading to "Desirable Result" Is Naturally Selected to Control

By MAX RADIN
University of California School of Jurisprudence

IT WILL become apparent soon, if it is not apparent in advance, that the chief incentive of what I shall say is a frustrated ambition. The one desire I have cherished—and I fear in vain—is to be a judge. To sit on a raised platform, to see before me and below me, the most eminent members of my profession, to pronounce the fateful words—"Motion denied—with costs!", "Objection overruled!", to make witty remarks which my victims dare not resent for fear of being committed for contempt—and I should commit them freely—that seems to me a highly satisfactory way of exercising the sense of power which, modern psychology tells us, is the most potent determinative of men's conduct.

Dis aliter visum. It was not to be. I can only hope that if I am born again, I shall be born with those qualities of character, of mind and of person, necessary for the attainment of a judicial position, however humble. And if in the next birth this should happen, or in the birth after the next, and I should find myself in a society organized socially and economically very much as this one is, I make no manner of doubt that I shall think and act as judges have pretty uniformly thought and acted ever since Moses, J. handed down his important decision in the case of Estate of Zelophehad, 4 Pent. 27.

Perhaps we may as well confine ourselves to things that happen in this birth. Let us consider the case of Zurishaddai Perkins of the great state of Connecticut, a man of austere Puritan lineage and of almost unbelievable learning. He knows all the decisions that have been handed down ever since the foundation of that historic commonwealth. He has in mind and can quote from memory all the revised statutes in force on the day he first takes his seat as a judge of the Superior Court, the court of general original jurisdiction of his state. He also knows—for who does not?—the principles of justice, the fundamental ideas of morality, the eternal differences between right and wrong.

So equipped he finds on his docket the case of Obadiah Applegate, a grocer, against Ezekiel Chuzzleworth, for goods sold and delivered. The complaint recites the terms of the agreement, delivery of the goods and non-payment. Secondly, there is the somewhat more voluminous complaint of Mrs. Prudence Sevenoaks in which she tells how at the northeast intersection of Third and Main Streets she signalled a car of the Hartford Street Railway Company, how the car came to a stop, how she attempted to board it, how she had grasped one of the railings and placed one foot on the step of the rear platform, how one foot was still on the ground, how, without warning and without reasonable occasion on her part to apprehend such an event, the car suddenly started and how she was in consequence flung upon the ground and thereby suffered severe bodily contusions, bruises and injuries, and by reason of such injuries was disabled and is still disabled from attending upon her usual occupations, to her damage ten thousand dollars. To each of these complaints a demurrer is interposed.

Now what does His Honor do? Does he search his mind for the principles of justice, divide them into classes I, II, and III, and under class III, "Duties to one's Fellow-man" does he subdivide into (a), Duties of Active Benevolence, etc., until in this process of division and subdivision, classification and analysis he comes upon something that will exactly fit such qualified human beings as greengrocers and the officials of a street railway company. Somehow, I do not believe he does. Or does he say to himself, "I know Chuzzleworth to be a hard working, simple, meek man, a regular attendant at church on the Sabbath, one of the deserving poor, while Applegate is rich, fat, sleek and undeserving. And on the other hand, Dame Prudence is insured for accidents like this and has really not lost a cent by her injuries while the Hartford Street Railway, in which my bachelor uncle owns a block of stock, has, to my knowledge, not paid a dividend for lo! these many years. Go to, we will, in the interests of equity and good conscience, sustain both demurrers." That seems equally unlikely.

What does he really do? I think it is not difficult to guess. The situation of a person bargaining for actual wares, agreeing to pay a certain amount for them and carrying them off on a promise to pay at future time, is a common situation. Many such cases occur. They are not altogether alike. It is potatoes in one case and a Cadillac limousine in the next. It is a good reputable citizen in the one instance and a bank-director in the other. But if not really identical the situations do resemble each other. A generalized situation of this sort is in the judge's mind and is immediately called up by the case of Applegate vs. Chuzzleworth. And this situation carries with it a certain number of definite regulations; among them the rule that under these circumstances, a person like Chuzzleworth owes to a person like Applegate the agreed value of the goods, and ought therefore to pay it. And in the second case, perhaps not so promptly but quickly enough, the situation would seem to fall within a group containing other situations very much like it

and would carry with it, a requirement that the Railway Company make good the loss occasioned by the injuries sustained.

Now, the situations which he used for purposes of comparison did not get into his mind by inspiration or as an inevitable deduction from an absorbed contemplation of the Good, the True and the Beautiful. If Nature and Reason alone were his guides, it would have been just as easy to reach a different or a somewhat different result. But the standard transactions with their regulatory incidents are familiar ones to him because of his experience as a citizen and a lawyer. He has often had them in mind. He has taken them for granted for a longer time than he can remember. He does not argue about the conformity or lack of conformity of the result he reaches with justice or propriety. He does not think about it at all. The matter, he would tell us, is simple and obvious. To use a figure contemptuously applied by the German jurist Kantorowicz, the whole transaction is dropped into its proper category, like a nickel in a slot-machine,—and, click! out comes the decision at the bottom!

Not only in a great many cases would the judge's mind—Mr. Justice Zurishaddai Perkins of Connecticut. you will remember—work like that, but I do not see how it very well could work otherwise. And I am sure that for my part, I should not wish it to.

But just because it is so easy, this situation will rarely come before him—at any rate not so unmistakably that the standard, the category by which it is to be measured, leaps at once to his mind. The situations that do come before him are complex ones, long ones, cruelly hard ones. Sometimes, even after they are boiled down and summarized they take ten or fifteen printed pages to state. A Mr. Shaw has an arrangement with his broker to have the latter buy and sell stocks on his order to be paid for by monthly bills and secured by the pledge of other stocks and securities, with power in the broker to dispose of the securities provided he has always at hand stocks of the same amount, and with the further understanding that Shaw may withdraw on demand any margin exceeding ten per cent of the account. These form only a part of the statement of facts involved in the important case of Richardson vs. Shaw in the U. S. Supreme Court, but enough has been told to make most laymen dizzy. Not one but twenty generalized standard situations are called up by this case some of which are part of larger groups, and many of which are actually excluded, so that if the nickel is dropped in the slot, there will be no click and no chocolate covered judgment at the bottom, but a peculiar noise; and after much thumping and shaking of the machine. you may have to go in and swear at the proprietor.

In the case of Richardson vs. Shaw the standard situations are numerous. Some are selected as really like the one in hand and some rejected. Good reasons are advanced for doing so and equally good ones could have been advanced for the opposite. Indeed the special opinion of one of the Justices is illuminating. "Left to myself," he says, "I should have reached a different result and I have presented reasons for my view to my brethren, but as it has not convinced them, I suppose I must be wrong. I therefore concur, but I cannot help feeling a lingering doubt." The judge who makes this modest statement is Mr. Justice Holmes and I leave it to you to judge how doubtful a case must be when Mr. Justice Holmes cannot be sure that the majority is hopelessly wrong.

Suppose we take up something simpler and less involved. A great American lawyer, Mr. John Chipman Gray, took as his favorite illustration in his Nature and Sources of the Law the incident of a person ordering shrimp salad in a restaurant. Recently the Court of Appeals of New York, the highest court in that state, had occasion to consider that question. So also did the Supreme Court of Massachusetts and of Connecticut. Is the transaction a sale? Three hundred years ago, the court of the King's Bench said it was not and announced the sturdy English doctrine that solids,—and liquids,—taken into the body through the mouth are designed not for nourishment but for entertainment. Now the Connecticut and the New York courts came to very different conclusions on whether the taking of food in a restaurant is a sale. It certainly has many of the features of sale. And it certainly has many features that are not like other sales—not like the potatoes Obadiah sold to Ezekiel in our suppositious case. Generally a purchaser may do what he likes with what he has bought, but in a restaurant you may do only one thing with what is supplied to you,—you may eat it. And if you won't or can't eat it, you must let it alone. You don't have to eat the potatoes you buy at the grocery, but may tie them in a string and hang them around your neck, if you choose.

How did the New York court come to identify the restaurant incident with a grocery purchase and the Connecticut court refuse to? They did a wicked and surreptitious thing. Instead of working backward at principles and standard cases, they worked forward at results. In both cases the point was that the plaintiff had eaten of the defendant's food at a restaurant and had in consequence suffered the distress of ptomaine poisoning. Now, if the transaction is a sale, there is a warranty of wholesomeness and the restaurant keeper must pay. If it is not, there is no such warranty and the restaurant keeper need not. Well, the New York court thought it only proper that the restaurant keeper ought to pay and felt that their lordships of the King's Bench, three centuries ago, did not know everything about such matters. They had never dined in cheap New York restaurants. The Connecticut court said that restaurant-keeping is a thankless, hard business, beneficial to the public and that the class that managed it ought not to be burdened more than need be; and the court felt very much supported by this ancient judgment I have mentioned.

Really, did the question of whether dining at a restaurant is a sale or not have anything to do with the judgment? I cannot believe for a moment that it did. A desirable result was reached and the court selected as its standard, that situation which would secure the desirable result.

Another case—again a matter of food and drink—I have had recent occasion to consider. A southern gentleman seated on a fence in the Kentucky landscape, handed his friend a brown jug which jug the aforesaid friend lifted to his lips and partook, it seems, of a considerable part of the contents thereof.

The friend was arrested. Drinking is not a crime according to the Volstead law but being in possession of liquor or container is. Now was the friend in possession? Ah, that is a difficult matter, gentlemen. The great Savigny wrote a classical treatise on Possession, many times translated. So did the still greater von Ihering. There is the well-known book of Pollock and Wright. Saleilles in France had a definite theory on the general subject, as also did Huber, who wrote so large a part of the excellent Swiss Code. Is possession protected as an outwork of ownership or as a social good valuable for itself? These are hard problems into the solution of which the men I have mentioned have wrought philosophy, economics, history in different proportions. Did the Kentucky court prepare itself for its decision by a study of Ihering, Savigny, Saleilles, Huber, Pollock? Perhaps. But I venture with a little diffidence to suggest that a court in such cases does something very different. A court feels that drinking ought or ought not to be punished in the interests of prohibition enforcement. If it feels it ought to be, it cannot say so directly, because the law does not make drinking punishable, but the court will in that case get as near to punishing drinking as it can. If the court does not wish to extend the inhibitions of the Volstead act, it will not approach drinking more closely than it must.

I wish to state that the Kentucky court found that defendant had not been in possession of the brown jug or its contents. Of course they might have learned that from Savigny and von Ihering and from the fragments of Julius Paulus contained in the Digest of Justinian.

These cases illustrate another and a common way in which judges arrive at their conclusion. The category into which to place the situation presented to them for judgment, does not leap into their minds at once. On the contrary, several categories struggle in their minds for the privilege of framing the situation before them. And since there is that struggle, how can they do otherwise than select the one that seems to them to lead to a desirable result. Sometimes a court will say so directly. In a case—wild horses will not tear from me the statement of what jurisdiction it was in—it was stated—I quote literally—"But we think it clear that if such a case is to be brought within section 3313 of the Civil Code, that section must be given such an interpretation as to lead to a reasonable result."

Is the question which forms the title of this paper merely a study of psychology, normal or otherwise? Far from it. It is the most practical of all questions for us. What judges thought, *was* the law and, what they will think, *is* the law. It is quite impossible—if there are judges at all—that it can be otherwise. It is as true of such places as 18th century Prussia in which the judges were humble and timid ministerial officials as in the Paradise of judicial indiscretion, Great Britain of the 18th and 19th centuries, where the maxim certainly prevailed, *boni iudicis est ampliare iurisdictionem.*

If that is true, we must at our peril think the way judges do, we must reach the result they do, or rather we must reach the result they will reach just one jump ahead of them. And if they act more frequently than otherwise by discovering the desirable result first and summing their category to justify it, afterwards, we really ought to know what test they employ in determining that a result is desirable.

What makes certain result seem desirable to a judge? Judges, we know, are people. I know a great many. Some were my school-mates—some I met elsewhere than in school. They eat the same foods, seem moved by the same emotions, and laugh at the same jokes. Apparently they are a good deal like ourselves. If, therefore, in a controversy in which we are engaged, we could rid ourselves of the personal interest in it, we might shrewdly guess that a great many judges would like to see the same person win who appeals to us. But we must be quite sure we have performed that difficult feat of ridding our minds completely of our personal interest in the case. You remember the Missouri mountaineer woman who watched a fight between her husband and a bear and remarked as she inhaled smoke through her clay pipe that this was the first fight she ever saw in which she did not care who won. If a case comes into our office and we can view it for a few fleeting moments with this Missouri detachment, we shall have opened up vistas of what the decision is likely to be—unless we can prevent it.

What gives judges this opportunity of working their judgment backward, from a desirable conclusion to one or another of a stock of logical premises, is the notable fact of human nature that conduct tends to run in types. We are none of us really individuals. Most of the things we do are pattern things, groups of acts rather than wholly separate acts, and many of these groups have at some time or other been considered by courts. The shifting character of human experience rearranges groups, rather than creates wholly new ones, and it will go hard with any situation that a court has to deal with if one or another of its elements does not point to a category in which a desirable conclusion is snugly bundled up, ready to be discovered by strictly logical reasoning according to the rules of the Aristotelian syllogism.

This sounds dreadfully abstract but lawyers should be the last person to complain of abstractions. They have been very prone to state their categories—which are not really abstractions at all, but generalized types of conduct, pictures much more than any thing else, as though they were philosophical principles. Fortunately lawyers have handed down the tradition that the abstract formula is really only the sum of the situations from which it was derived, and except as suggesting these situations means just nothing at all. Except for this admirable legal tradition, courts could never have managed their business at all. As it is they are sometimes lulled into forgetfulness of it, and then mischief is often enough done. We may have read in our manuals of cases of real property the ancient maxim, *cuius est solum, eius est usque ad coelum,* "He who has the soil owns it up to the sky." Professor Goudy of Oxford has examined the history of this brocard and has shown us how and when it was so formulated, but many of us met it full grown and swallowed it whole. When airplanes became frequent, they fell foul of this fine old piece of Carboniferous law. It didn't stop the airplanes to any noticeable extent, but it bothered a great many lawyers and courts. Now, as a matter of fact, it never was any more than a rudely poetic way of saying that if a man owned land, he could properly

complain if his neighbor shot things across it, or let trees hang over into or or strung wires over it. To the extent that an airplane produces the same interference with enjoyment, the airplane comes within the situations obscured by this medieval jingle. In the same way the sonorous rule *sic utere tuo ut alienum non laedas*. which Coke foisted on us as derived from the Roman law, turns out, when we look at the situations he had in mind, to be no more than a magniloquent way of asserting the more prosaic injunction—"Commit no nuisance."

In fact abstract magniloquence is one of the banes of our calling. Practical as we profess to be, we have buttered our parsnips with fine words so much, it is sometimes hard to find the succulent vegetable under the oleomargarine. I have no objection to fine words. In my heart I like them better than parsnips (which I could never abide); but I want them taken for what they are, for the poetry of the law chanted to fill our hearts with the proper juristic ardor before the battle begins; but we should see to it that the bards and poets are carefully led to the side-lines when the conflict is on.

This thing that judges do quite normally and naturally because although judges, they are also people, and which with the mass of type-situations which, like Zurishaddai Perkins, they have in mind, they are easily enabled to do, is also something which they have the express warrant of a great modern school of jurisprudence in attempting. The legal sociologists, represented in Germany by Heck, Danz, Kantorowicz, Ehrlich, in France by Cornil, in America by Dean Pound, holds that the only proper consideration of a court is whether the goal of its decision is an economic or socially valuable thing. Not only have these thinkers announced this, but it is likely to be specifically incorporated into a statute. The republic of Poland is busy preparing a code which they consciously desire to make the latest and newest things in codes conceivable. The leading jurist in Poland, Professor von Koschembar-Lyskowski has prepared a draft which is very likely to be accepted. In article 9, he defines an obligation as a "juridical necessity by which a person is constrained to act in accordance with the opinion of honorable men under the particular circumstances with a view of effectuating the social and economic goal determined by law." This is all very well and very fine and noble. But I wonder whether Professor von Koschembar-Lyskowski quite realizes how big a job he is imposing on the court if the court were to take him seriously. Of one thing we may be sure. If the Code should be passed, Polish judges—if they are people—will continue to determine causes by the standard situation immediately called up in their mind, and in a great many conflicting ones are called up, they will decide according to which one of the litigants in the particular case before them they would like to see successful.

I have said nothing about what seems to the layman to be law par excellence, viz. statutes. I was brought up among lawyers that hated statutes. I remember a distinguished New York attorney, who in 1902 still resented the fact that common law pleading had been abolished in 1848, wrote his briefs solely on the basis of adjudicated cases and the day before they were sent to the printer, would grudgingly tell his clerks; "Go into the library and see if that fool of a legislature has changed the law on us."

What is a statute for? Or better, what do judges think a statute is for? We have seen what some judges in this anonymous jurisdiction think a statute is for. It is for the purpose of reaching a desirable result, and if the statute won't reach one, he just won't apply it. The framers of the Polish Code apparently think a statute exists for the purpose of enabling a judge to make a series of profound economic, social and ethical studies of the community. My New York friend thought a statute was something a nice person wouldn't mention.

Most of the European nations have claimed that they wished to put as much of this law into statute form as possible. At one time it was the fashion in England and America to protest that as little of the law as possible should be put into statute form. That is certainly no longer true of England which has already codified a great deal of its law and may soon codify the rest, nor of many of the United States and particularly not of California. However, even if they had not done so, the so-called principles of the common law as far as they were determinable were generally framed in a form that could just as well have been in a code, and the only apparent difference was that if they were scattered in cases, the "principles" were harder to find than in a code.

The real point is that whether in code or cases, the "principles" are not principles at all but aggregations of type transactions, schematized to make them easier to carry in one's memory. And in most cases they have been so treated.

But the judge occasionally finds a statute before him that is rude and arbitrary; that says "You never mind the social and economic goal of the controversy before you. You just decide it in favor of Applegate (or of Chuzzleworth) or by heck—well, I don't know what I may do." Often the judge runs across a statute like this before he has begun to think about the social and economic goal at all, and it may be that he won't think about it. The picture which is his pattern situation has been painted for him by the statute with such vivid colors and such firm outlines that the figures of Applegate and Chuzzleworth are seen at once to fit exactly into the frame.

Now, suppose the judge to be convinced that Chuzzleworth and not Applegate, ethically, socially, economically, according to the feeling of honorable men, ought to win. But the statute almost specifies Applegate. May he disregard it? Statutes have been disregarded by being ignored. May it be done so deliberately? Curiously enough in countries long accustomed to codes, a school has grown up of which some of the extreme members answer in the affirmative. In France and in Germany, a group of jurists have come into prominence called the Free-law men. These consist of some of the men I have previously called sociologists, but of others as well. Most of them—the leaders of them—do not advocate at any time a decision deliberately *contra legem*. But the extreme representatives—Fuchs of Karlsruhe, for example—are willing in some cases to go quite as far as that. The majority have declined to, for the best of reasons. There is no need of it. A statute is a general statement. It describes a general situation. It is a picture of which the outline is not solid steel, but rubber, or—shall we say?

—a wreath of smoke. It can be extended pretty widely and contracted pretty narrowly. And if you are a little clever, it will catch or let out the situation you are deciding.

Indeed, where the frame is rigid, where the statute cries out for Applegate as against Chuzzlewort, it is highly likely that the controversy will rarely come up.

Now in the matter of pulling the statutory frame apart or tightening it, courts have developed a certain technique. And it is against this technique which in France and in Germany had become almost a form of craftsmanship, the Free law movement was really a protest. Here is your statute and here is your controversy between Herr Schultz and Herr Schneider. The statute is a command of the Sovereign ordering you to prefer Schultz—or Schneider. But which? Well, the statute was issued in 1874 by the members of the then Reichstag; we have their debates, the reports of the committees they used; the documents before them. From them we ought to be able to determine whether they meant Schultz or Schneider. In the United States we are not unfamiliar with this technique, with an anxious scrupulousness as to what the particular legislature at an historically determinable moment had in mind.

It is perfectly true that before the machine had been set in motion, it had already been seven-eighths decided that Schultz should come out at the other end of the slot. But the objection to the technique did not come altogether from the partisans of Schneider. It was that the technique is in itself baleful and completely false. It did not, in the first place, tell us what the actual majorities that voted on this bill really meant by it. And more than all, it did not make a particle of difference what they meant by it. The famous Josef Kohler, of Berlin—not a Free-law man at all, but on the contrary a Hegelian philosopher of real power—expressed it by saying—"Not what the legislators *meant*, but what the law *means*." If we could register by some psychographic device, exactly what was in the minds of the man or men who framed and passed the statute, the determination of that fact would be as irrelevant as last year's snow. The legislators were not in the least empowered to impose their will on the judges, even within given limits. They were empowered to give directions to judges in the decision of causes, directions framed in intelligible terms in the official language of the country. If their directions are couched in unintelligible or incoherent terms, the judges may disregard them without any examination of what the legislators would have said if they had known how to express themselves. If the language is ambiguous, the judge may draw either of the several possible inferences from it. It is obvious he will draw a pleasing inference and not a displeasing one.

It is significant that this contention of Kohler and the Free-law men represents pretty precisely what was the English rule without any free-law movement to support it. In England the courts have frequently refused to admit into evidence debates of Parliament, reports of commissions and the like. The law spoke for itself. American courts with a larger statutory material to handle, have made many essays into the Continental technique; and there are indications that England will do the same. It would be extraordinary if a method likely to be discarded where it was fully developed should begin a new career in jurisdictions that had hitherto repudiated it.

In determining then how the law wishes him to decide, the judge looks at the law. He professes some times—perhaps generally—that he looks at what the legislators wished him to do—but that is really not so. We have the law before us as well as the judge, and if it is in a code where we can find it quickly, we can make up our mind whether it directs him to find for Applegate, as well as he can. That is when the directions are unmistakable. Mr. Chief Justice White in the United States Supreme Court in interpreting a Federal statute, said that he reached his conclusion as an irresistible implication from the words of the act. Unfortunately four members of the court resisted the implication so well that they found the opposite.

Unmistakable directions, irresistible implications, are few. Yet some times they are present when some of us might not think so. What does "actual" notice mean in California Code § 3002, which the pledgee must give to the pledger? It could easily be taken to mean notice which he normally would get and if he isn't an artful dodger he would be pretty certain to get. But it doesn't. It means notice that he does get and which if he is an artful dodger he can easily prevent himself from getting. This is not a desirable result and I can imagine many a judge who will wish to reach the opposite and yet will feel himself constrained by § 3002 not to do so. How can we be so nearly sure? Merely because judges living among us know the opinion current among those whom it concerns that "actual" notice means this sort of notice.

This brings me to the final part of my paper. We have to think with the judges and, if we wish to earn our bread, think like them. But judges often speak as though the heaviest burden placed upon them is the requirement that they should think like us. In our case, our text-books—our statutes—even, perhaps especially in the scientific restatements that our Institute of Law puts forth, the word "intent" is of frequent occurrence. Courts are directed to determine matters according to the intent of the party or the parties. If we are to take this too seriously, our task as lawyers becomes frightfully complicated. We are not merely to make certain what judges will think, but to make certain what judges will think Ezekiel and Obadiah thought. Our thinking is in consequence twice removed from the transaction we are concerned with.

Fortunately we need not take this too seriously. I have said that it does not seem to me of more than historical importance to discover what the legislature in some past session meant by the words they put into the law. And I do not think it is of any greater importance to know what the parties actually meant. If Ebenezer uses a weasel word, we are not to follow it into all the burrows it may have crawled from or into. We are really only concerned with knowing how two persons—like ourselves—who used certain words ought to be obligated because they used them. We may be sure judges have followed the famous doctrine of Chief Justice Brain, *tempore* Ed. IV, who declared that the thought of man was not triable. Not even the devil, he said, knoweth the thought of man. If I may believe certain litigants, some judges have a great

many qualities that the devil has, but they did not mean that these judges were as wise as the devil.

Most judges have very properly declined to compete with the devil in trying to know the thought of man. What a man said and did is enough. Only they must be sure to know all or very nearly all that he said or did. They are not as satisfied now as Brian would have been to know whether his physical hand did or did not impress a seal on a piece of red wax. They have made their task difficult for themselves by trying to know more than that.

But they are not always excessively inquisitive. Judges are people and the economizing of mental effort is a characteristic of people, even if censorious persons call it by a less fine name. If in investigating a transaction which comes before him, element after element appears and a great many of them seem to fit quite neatly into a type situation that has somehow been early called up in his mind, a judge economic of mental effort, may decline to disturb it by searching for new elements which might compel the substitution of a wholly different situation. That may happen just as well in the case of the most industrious and energetic judge, who without a disinclination to work, must have the natural tendency to regard with favor suggestions that have arisen in his own mind.

The situations that will so arise will generally be a pleasing or a satisfactory situation. And it is highly likely that a situation which seems pleasing to a judge would seems so to us, if we could omit reflection on our pecuniary interest in a particular result. What difference then need it make to us whether the movement of the judicial mind is from the type situation forward to the particular one, or from the particular one backward to a type situation that is selected—often quite consciously—because it leads to a desirable result? And yet it does make a difference. In order to perform this feat, judges have recourse to a great many devices. They relate back. They presume. They impute. They take judicial notice. They refuse to take judicial notice. They construe. They charge with knowledge. They impress trusts. And they don't always do this in the same way. What one judge reaches by presumption, another will, by relation.

When we are searching for type situations which we can suggest to the bench to base a judgment in our favor, we find them with all these products of judicial activity and we frequently have to take them as a whole with all these products around them and disentangle them afterwards. That is hard work and lawyers are as reasonably economic of mental effort as any other branch of the community. They wish to confine their efforts to doing what I am told some lawyers can do very well. They paint the situation they would like to have the judge find desirable so charmingly that they sometimes succeed in pushing the judicial preference aside altogether and inducing under the hypnotic spell of their skill, the judge to sign their painting as his own work. Naturally they don't want to be put to the additional trouble of finding a frame for the painting.

Does all this make for anarchy and destroy all sense of security? I think not. Real security, absolute security, one hundred per cent certainty, we cannot have. We can approximate it, but no more. Our business is prophecy, and if prophecy were certain, there would not be much credit in prophesying. But, as I have said, we can come fairly near certainty. I suppose it is pretty nearly certain that Justice Perkins will not sustain the demurrer in the case of Applegate vs. Chuzzleworth, whom I trust you have not forgotten. And a great many other situations will be like that. Then, since by hypothesis Justice Perkins knows so much more than we do, a great many types will be fixed in his mind and be as immediately suggested by a given controversy as the two with which I began.

But in that great mass of transactions which will not fit readily or quickly into established types, or will fit into one just as easily as another, the judge ought to be a free agent. We need not fear arbitrariness. Our Cokes and Mansfields and Eldons derive their physical and spiritual nourishment from the same sources that we do. They will find good what we find good, if we will let them. And if they had not prescribed to themselves the curious necessity of putting the transaction to be regulated into one type-form rather than another—assuming that it could go into either and will not without pushing go into any—they would have no need of their relations and imputations, their presumptions and suppositions, their gyrations and concatenations, and could cut straight to the desirable result which they in common with ourselves as members of the community prefer.

We are all of us not only lawyers but teachers of law. We must teach law, if to nobody else, at least to our clients. We must therefore teach them what judges will think about their business. If we say to them "The transaction in which you were engaged resembles any one of half a dozen standard situations. It resembles No. 1 a little more closely than No. 2 or 3 or 4. But to put it under No. 1 would lead to an undesirable result. What the judge ought to do is to state these facts and admit that he has created a new type, which I can keep in mind or know where to find, because of its similarity to No. 1. But he will probably not do that. He will try to squeeze it into No. 2 which it only slightly resembles but which will lead to a desirable result, and in consequence when something very like our transaction occurs again, we shall have a great deal of trouble in finding it. In fact we had better examine all cases of type No. 2, to see whether a transaction like ours has not already been put in that place. For if we know how they have thought once, we are helped to guess how they will think again."

It is an undoubted fact that the chief purpose courts fulfill in giving us not merely a judgment but a classification of the judgment by types and standards, is to make it easy for us to find out how they think. The technique which has become traditional in Europe and America seems to me to make it hard.

Are judges under any obligations to make things easy for lawyers? After all, why should they? We don't always make things easy for them.

EDITOR'S NOTE: The foregoing article was delivered as an address at a luncheon meeting of the Bar Association of San Francisco on April 7, and was later reproduced in *The San Francisco Recorder*, a daily legal newspaper of the California city.

JUST WHAT HAS THE SUPREME COURT DONE TO THE KANSAS INDUSTRIAL ACT? WHY DID IT DO IT?

By Hon. William L. Huggins
Author of Bill Which Became Kansas Industrial Act and First Presiding Judge of Court of Industrial Relations

JUST what did the United States Supreme Court do to the Kansas Industrial Act? Why did it do it? These questions naturally present themselves to everyone who has been interested in the Kansas experiment. In this article the case of "Charles Wolff Packing Company versus Court of Industrial Relations of State of Kansas" will be referred to as "The Packing Case." The first decision of the United States Supreme Court in that case, rendered June 11, 1923, 43 Supreme Court Reporter 630, will be referred to as "The First Case." The decision of the Supreme Court in the same case rendered April 13, 1925, will be referred to as "The Second Case." The Supreme Court of the State of Kansas will be referred to as the State Court. The italics used in this article are the writer's.

I. What Was Done

The United States Supreme Court in the first case in a summary at the close of the opinion says:

> We think the Industrial Court Act in so far as it permits the fixing of wages in plaintiff in error's packing house is in conflict with the Fourteenth Amendment and deprives it of its property and liberty of contract without due process of law.

However, this brief statement does not tell the whole story. It is apparent that the United States Supreme Court, by these two decisions, has left the Industrial Court with no authority under Section 8 of the Act to fix wages, to fix hours of labor or to fix working conditions in *some* of the industries included within the provisions of the Act even in case of great public emergency caused by strikes or other labor disturbances. Nevertheless, under Section 7 of the Act, the Industrial Court will still have authority to investigate labor controversies, to subpoena witnesses, to take sworn testimony and to make a record of the same. Upon that evidence it may make findings of fact concerning the controversy and everything that affects it. It may make recommendations, which become a public record and may be published and may influence public opinion.

This restriction, however, applies only to the businesses of the third class described in the first case. These third class industries, so far as the Industrial Act is concerned, are (a) production of fuel, (b) manufacture of food, (c) manufacture of clothing. For all practical purposes in Kansas, at the present time, at least, the restrictions would affect coal mining, flour milling, and meat packing. Neither the first nor the second case affects the administration of the Industrial Act as it applies to common carriers and public utilities. The United States Supreme Court seems to have been careful to state that it is not deciding the constitutionality of the Act as applied to businesses which are of such a nature that the state has the right to *compel* continuous service and to fix the price therefor.

Neither are the penal provisions of the Act affected by either of the decisions. The penal provisions which remain in full force are those which the Legislature intended should *prevent unreasonable interference* with any of the industries included within the terms of the act, whether by violence, by intimidation or by economic pressure. These provisions include the prohibition of picketing, intimidation, threats against or abuse of other workers, or conspiring with other persons to induce workers to quit their employment for the purpose of *"hindering, delaying, interfering with or suspending* the operation of any of the industries" named in the Act. The Act still makes it a misdemeanor, punishable by fine and imprisonment in the county jail, for any person willfully to do any of the things prohibited by the Act. It is still a felony for any officer of any corporation engaged in any of such industries or for any individual or partnership engaged therein, or for any officer of a labor union whose members are workers in any of such industries, *willfully* to use the "power, authority or influence incident to his official position or to his position as an employer of others," to *intentionally* influence, impel or compel any other person to violate" any of the provisions of the law prohibiting interference with said industries.

The first decision did all this as to the fixing of wages and the second decision faithfully following the first extends the same principle to the fixing of hours of work and working conditions. There seems to be nothing new in the second decision so far as the statement of law is concerned.

Since the enactment of the Kansas Industrial Act public attention and newspaper comment have been directed almost wholly to those provisions of the law which permit fixing of a temporary minimum wage, hours of labor and working conditions in case of threatened industrial warfare. No doubt this accounts for the fact that at the time of the first decision and since the second decision of the Supreme Court of the United States, news and editorial columns have been filled with statements to the general effect that the Kansas Industrial Act in its entirety has been declared unconstitutional. As a matter of fact, those features of the law (sometimes called the "remedial" sections) at the time the law was enacted were considered by the Legislature as necessary in order to give labor some protection of law to take the place of the alleged protection that labor had claimed through the strike of violence and intimidation which the Legislature believed was being taken away from labor by the "penal" features of the law. It is significant therefore that the Supreme Court of the United States has not yet declared the penal features unconstitutional.

In case, hereafter, a statewide conspiracy in the coal mining industry should stop production and thus deprive the people of the state of the fuel necessary to maintain industry, to warm the homes, the schools and the hospitals, and to preserve life and health, would the Supreme Court of the United States hold that the conspirators could not be prosecuted? Or,

would the United States Supreme Court hold in such a case that if found guilty of "willfully hindering, delaying, and suspending" coal mining by means of such conspiracy the conspirators could not be punished under the penal sections of the Act? If a great and powerful labor leader, such as Alexander Howat *was* before the enactment of the Kansas Industrial Act, should again use his unlimited power as such leader to compel his subjects (the miners) to violate the penal sections of the Act and thus bring the public to the very verge of a terrible calamity as he did in 1919, would the Supreme Court of the United States hold that he could not be punished under Section 19 of the Act?

It requires no more than a superficial study of the Industrial Law as modified by the two decisions of the Supreme Court of the United States in the packing case to convince any lawyer that the *public* has lost little, if anything, by these two decisions. The public is still well protected by the penal sections even in coal mining, meat packing, and the other industries of the third class. Both organized capital and organized labor evidently prefer *private warfare* to any kind of *public regulation*. But the Supreme Court of the United States has not yet left the people without remedy against the peril of private warfare as heretofore waged in the great industries which so directly affect (as a matter of fact but not of law) the peace, the health, the welfare and the prosperity of the general public.

II. Why Was It Done?—The Construction of the Statutes: (1) By the United States Supreme Court, and (2) by the Kansas Court

(1) *Consntruction by the United States Supreme Court*

It must be borne in mind that the United States Supreme Court (in the first case) said:

> The (Kansas) Supreme Court's construction of the operation and effect of the Act is controlling.

The United States Supreme Court construes the Kansas Industrial Act as imposing *involuntary servitude* upon labor and *involuntary production* upon the owners of the industries affected. In the first decision the Supreme Court says:

> The necessary postulate of the Industrial Court Act is that the State representing the people is so much interested in their peace, health and comfort that it may *compel* those engaged in the manufacture of food, and clothing, and the production of fuel, whether owners or workers, to continue in their business and employment on terms fixed by an agency of the State if they cannot agree. Under the construction adopted by the State Supreme Court the Act gives the Industrial Court authority to permit the owner or employer to go out of the business, if he shows that he can only continue on the terms fixed at such heavy loss that collapse will follow; but this privilege under the circumstances is generally illusory. Block v. Hirsch, 256 U. S. 135, 157. A laborer dissatisfied with his wages is permitted to quit, but he may not agree with his fellows to quit or combine with others to induce them to quit.
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> The employer is bound by this Act to pay the wages fixed and while the worker is not required to work, at the wages fixed, he is forbidden, on penalty of fine or imprisonment, to *strike* against them and thus is *compelled* to give up that means of putting himself on an *equality* with his employer which *action in concert* with his fellows gives him.
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> We are considering the validity of the Act as *compelling* the employer to pay the adjudged wages, and as *forbidding* the employees to combine against working and receiving them. The penalties of the Act are directed against effort of either side to interfere with the settlement by arbitration. Without this *joint compulsion*, the whole theory and purpose of the Act would fail. The State can not be heard to say, therefore, that upon complaint of the employer, the effect upon the employee should not be a factor in our judgment.

In the second case the United States Supreme Court quotes from the Kansas Supreme Court and says:

> The following excerpt from the opinion of the Supreme Court of the State in State ex rel. v. Howat, 109 Kan. 376, 417, explains the *pervading* theory of the Act: "Heretofore the industrial relationship has been tacitly regarded as existing between two members—industrial manager, and industrial worker. They have joined wholeheartedly in excluding others. The legislature proceeded on the theory there is a third member of those industrial relationships which have to do with production, preparation and distribution of the necessaries of life—the public. The legislature also proceeded on the theory the public is not a silent partner. When the dissensions of the other two become flagrant, the third member may see to it the business does not stop."
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> The system of compulsory arbitration which the Act establishes is intended to *compel*, and if sustained will *compel*, the owner and employees to continue the business on terms which are not of their making. It will constrain them not merely to respect the terms if they continue the business, *but will constrain them to continue the business on those terms.*

(2) *Construction by the Kansas Court*

In State v. Howat, 109 Kan. 376, 198 Pac. 685, the Kansas Court by unanimous decision says:

> Section 17 makes unlawful conspiracy to quit employment and to induce others to quit, picketing, and the bludgeoning of those who want to work, whether employees or not, by abuse, intimidation, and threat, for the *purpose of accomplishing that which the statute was designed to prevent.* . . . It is said the Act of 1920 is void because it trenches on personal liberty. The personal liberty contended for is liberty to leave the employer's service. All the leading cases in which the principle involved have been discussed are cited. It is not necessary to review them. The statute expressly guards the privilege of any employee to quit his employment at any time. He may quit before controversy arises, when controversy arises, while controversy is raging, and after controversy has been adjusted. *As many others as desire may do likewise, and they may do so as the result of mutual-interest consultations.* No employee may, however, transgress the limits of his personal privilege, as defined earlier in this opinion, for the *purpose* of *limiting* or *suspending* production, contrary to the provisions of the act.
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> Persons, firms, corporations and associations were forbidden willfully to *hinder, delay, limit or suspend* continuous and efficient operation of the supervised industries, contrary to the act or for the purpose of evading any of its provisions. The right of any individual worker to quit his employment at any time was expressly recognized; but conspiracy and confederation with others, and inducement and intimidation of others, with *intent to cause suspension of* operation of supervised industries, or to *limit their output*, was declared unlawful.
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> The extent of the regulation, so far as it affects the defendants, (Howat and other Miners' Officials) was *protection* of reasonable continuity and efficiency of production. Production is fundamental: there can be no distribution or consumption until there has been production. *Continuous* production, and production according to the approval of an efficiency expert, *are not required* at all. Only that continuity and efficiency are required which will secure the people from *privation* and *oppression*. *Limiting* production and *withdrawing* from production are expressly permitted, for any purpose which does not contemplate circumvention of the law. The court of industrial relations, however, has oversight of production all the time. Jurisdiction is not suspended from crisis to crisis. If the court must wait until the evils of a crisis have been suffered, the statute is nugatory. Should authority be too zealously manifested in improper or unwarranted interfer-

ence, the particular orders are subject to review (by the State Court) and may be annulled.

In the packing case, 109 Kansas 629, 201 Pac. 418, the Kansas Court says, quoting from Brooks-Scanlon Co. v. R. R. Comm., 251 U. S. 396:

> A *common carrier* cannot, under the Fourteenth Amendment, be compelled by a state to continue operation of its railroad at a loss.

The Kansas Court quotes from Bullock v. R. R. Comm., 254 U. S. 513:

> A *carrier* cannot be compelled to carry on *even* a *branch* of business at a loss, much less the whole business of carriage.

The Kansas Court then proceeds:

> When the defendant's business became affected with a public interest, the public had the right to say *something* about the manner in which it should be conducted. The Legislature has undertaken to do so, has provided for the regulation of that business, and has placed certain prohibitions on the manner in which it shall be conducted; but the Legislature has not said that the defendant cannot under any circumstances *cease* to *operate* its packing plant if it desires so to do. The permission that must be obtained from the industrial court by the defendant is not permission to do those things which it may *rightfully do under the law*, but is permission without which the defendant, in doing other things, would be *violating the law*. In State ex rel Howat, 109 Kan. 376, 198 Pac. 686, this Court said: *"Limiting production* and *withdrawing from production* are expressly permitted for any purpose which does not contemplate circumvention of the law."
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> An analysis of these statutes reveals that the defendant is restricted from doing certain things with the intention of violating the law, or in other words is restricted from doing those things prohibited by the law. But the defendant is not, by the law, *compelled to operate its plant at a loss*, nor is it prohibited from *changing its business*, nor from *quitting the business*, if it desires to do either of these things in *good faith*, not intending thereby to violate any provision of the act. The language of the act will bear this construction; it will uphold the validity of the act, and not deprive the defendant of any constitutional right that has been urged by it.
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> The defendant is operating its plant at a loss. Why, does not appear from the evidence. At least this court is unable to determine why, and for the purpose of this discussion it is unnecessary to ascertain why. The plant may be badly located on account of transportation facilities. There may have been managerial mismanagement. A part of the money arising out of the operation of this plant may have been taken by the Allied Packers and used in the operation of the other plants conducted by them. It may have been that the loss was due to unstable conditions in live stock and meat markets prevailing during the time covered by the investigation of the Court of Industrial Relations. The defendant contends that to prevent operating its plant at a loss, it must have its employees work for less than what the Court of Industrial Relations has determined are living wages. In other words, the defendant is trying to prevent loss in its business by putting the loss on its employees. That should not be done if its employees are thereby compelled to work for less than living wages.

The State Court has not expressed its construction of the law in a "necessary postulate." Considering that Court's construction of the Act the writer believes if it had taken that method so to express itself it would have said substantially:

> The necessary postulate of the Industrial Court Act is that the state, representing the people, is so much interested in their peace, health and comfort, that it may if necessary to *protect* the peace, health and comfort of the public, *protect* "reasonable continuity" by *preventing unnecessary interruption* of the manufacture of food and clothing and the production of fuel, whether by owners or workers, even by a temporary fixing of terms by a state agency, if the parties cannot agree.

A study of the two "necessary postulates" will show clearly the difference in construction.

The excerpt from the opinion of the State Court in the Howat Case which is set out in the opinion of the United States Supreme Court in the second case, if wrenched loose from its surroundings and its context and set apart and considered apart may justify the construction placed upon the Industrial Act by the Supreme Court of the United States in the two packing cases. Considered, however, in connection with all that the State Court said in construing the Industrial Law —well, that is a very different matter. It does seem evident that the United States Supreme Court did not consider *all* that the State Supreme Court has said in construing the Act, else it would have referred in some way to more than the *one statement only* which it sets out in the second case. I do not know whether the United States Supreme Court's attention was called to these many statements of the State Court in its construction of the Act but I do say that the matters *herein* set forth clearly show a most remarkable *conflict in construction.*

In short, the United States Supreme Court holds that the Act *compels involuntary servitude* upon labor and *involuntary production* upon industry. A laborer may quit "but he cannot agree with his fellows to quit." He is forbidden to "strike" and is *"compelled* to give up that means of putting himself on an *equality* with his employer which *action in concert* with his fellows gives him." The employer is *compelled* to *continue* production unless he can show "such heavy loss that collapse will follow."

In short, the State Court holds that the Act is intended to *protect* industry from *unreasonable interference.* It protects the employee against unfair treatment which threatens to produce industrial warfare and against acts of labor officials which so often have caused serious loss to workers. The Act protects the employer and worker alike against picketing, threats, intimidation, and unreasonable economic pressure. It also protects the public against industrial paralysis with its untold suffering and economic loss. Any worker may quit his work at any time and "as many others as desire may do likewise, and they may do so as the result of *mutual interest consultation.*" A mere *concerted* quitting of work is not prohibited or penalized and, therefore, what might be called a *pacific* strike, is lawful. The State Court holds also that "the extent of the regulation" . . was *"protection* of *reasonable continuity* and efficiency of production." *"Continuous* production and production according to the approval of an efficiency expert are not required at all." The industry may "cease to operate" if it desires so to do. It is not *"compelled* to *operate* its plant at a *loss* nor is it prohibited from *changing* its business nor from *quitting* the business if it desires to do either of these things in good faith." The orders of the Industrial Court are at all times subject to annullment by the State Supreme Court, which in such cases, determine the *facts* as well as the *law.* Conflict in construction is plainly irreconcilable.

The point has been raised that the difference between a lawful *concerted quitting of work* and an *unlawful strike* is not clearly expressed in the statute. The test as to lawfulness or unlawfulness is always a question of *intent.* Alexander Howat, President, and August Dorchy, Vice-President of District No. 14 United Mine Workers of America, were convicted by a jury in the Criminal Court of calling an unlawful strike. There was no difficulty in that case because the strike was called for the avowed purpose of compelling the owners of the struck mine to pay a disputed claim to a miner who was not then in the employ of the owners of the struck mine. The jury found that

the strike was called with the intent to "hinder, delay, interfere with and suspend" the operation of the mine. Under the construction given those features of the Act by the State Court, as heretofore quoted, "the statute expressly guards the privilege of any employee to quit his employment at any time . . as many others as desire may do likewise and they may do so as the result of mutual interest consultations," the question as to the lawfulness or unlawfulness of the strike (although the word *strike* is not used in the Act) is always a question of *fact* for the jury. The working man or the officials representing him are always protected by the "reasonable doubt" doctrine of the criminal law.

There is no conflict in constitutional interpretation. All will admit that if the Kansas Act compels men to work against their will, it is unconstitutional. If it *compels* any business to continuously operate at a loss, it is unconstitutional. If it *compels* any industry, other than common carriers and public utilities, to continue business against the will of the owners, it is unconstitutional. If it imposes restricting regulations of any kind upon industries which are not affected or impressed with a public interest, it is unconstitutional. These constitutional limitations are not recent discoveries. They were all well understood by the author of the bill, by the Legislature which enacted, and by the State Court which attempted to construe the law.

III. The Public Interest

The most serious conflict between the courts is upon the question of public interest in coal mines, packing houses, flouring mills and industries of that class. Upon the question of public interest I quote from each court.

The Supreme Court of the United States in the first packing case said:

> It has never been supposed, since the adoption of the Constitution, that the business of the butcher, or the baker, the tailor, the wood chopper, the mining operator or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by state regulation. It is true that in the days of the early common law an omnipotent parliament did regulate prices and wages as it chose, and occasionally a colonial legislature sought to exercise the same power; but nowadays one does not devote one's property or business to the public use or clothe it with a public interest merely because one makes commodities for, and sells to, the public in the *common callings* of which those above mentioned are instances.

On the contrary, the State Court says in State ex rel v. Howat, 109 Kansas 376, 198 Pac. 686:

> It seems to this court to be quite remarkable that public interest in affairs of this kind should now be challenged by anybody—but the challenge is made, and its grounds may be briefly considered. . . .
>
> The mills of Kansas stand today "at the gateway of commerce" more prominently than did private elevators forty-five years ago. Great packing plants, belonging to what the Federal trade commission calls the "Big Five," are located in Kansas. Many smaller packing companies operate plants within the state, and the meat-packing industry *effectively dominates* not only a food supply, but one of the *great industries* of the state—the *live-stock industry*.

The words "at the gateway of commerce" are quoted from Munn v. Illinois, 94 U. S. 113.

The packing company in the Industrial Court says in its answer:

> Your respondent . . . prays that upon hearing it be determined by this court . . . that any interruption of your respondent's business *will result* in *hardships* and *loss* to the *farmers* and *live-stock producers* of the state of Kansas.

Commenting upon this issue, the State Court said in the packing case, 109 Kan. 629, 201. Pac. 418:

> The defendant argues that the *compensation* paid to its employees for services rendered is not affected with a public interest, but does not argue that the defendant's *business* is not affected with a public interest.

In contrast with the doctrine of the Packing Case, the United States Supreme Court in Stafford v. Wallace (42 Supreme Court Reporter 397) hold that the *stockyards* of the country are "great national public utilities to promote the flow of commerce from the ranges and farms of the West to the consumers in the East." But it is a matter of general knowledge that the "consumers in the East" do not *consume live animals*. They consume the meat products derived from live animals which have been passed through the processes of the packing house. Ninety-nine percent of the vast numbers of food supplying animals end their earthly journey at the packing houses. The stockyards are mere conveniences used in the promotion of the production and transportation of meat products for the consumption of the public. Surely it is a strange situation in which the stockyards are held to be public utilities subject to the rigid regulation imposed by the Packers and Stockyards Act while the packing houses are mere private enterprises.

The Supreme Court of the United States in both the packing cases assumes that the packing industry is a manufacturer (i. e., a preparer of food products) and nothing more. This was the minor, not the major reason that the Kansas Legislature classified the manufacture of food as impressed with a public interest, Kansas is a *livestock* producing state. Statistics show that it is *second* in the production of *livestock* and *meat products*. It also produces vast quantities of wheat and other small grains. Its beet sugar industry is considerable. There is virtually no market for fat livestock outside the demands of the packing companies. The words "the manufacture or preparation of food products" were used in the Act as a term which included a number of industries which were valuable to the state *chiefly* as *markets*. The major purpose of the Legislature was to protect the State's most valuable, if not its only markets for the farmers' products. This intent of the Legislature was understood by the State Court.

IV. The Law v. The Facts

The United States Supreme Court has made some important law in the two packing cases. Under the law coal mines, packing houses, flouring mills are mere private enterprises, "common callings," not affected with a public interest. The United States Supreme Court has so declared. Unfortunately for the public, the United States Supreme Court *cannot unmake the hard facts*. In 1919 chilly hospitals, cold and darkened homes, restricted public utility service, the rationing of coal by public authorities to minimize suffering, several hundred untrained volunteers, working under terrible climatic conditions and thus producing (only from the *surface mines*) about two hundred cars of coal at a cost to the State of about *seventy dollars per ton*, the realization that untrained volunteers cannot produce coal from the shaft mines, or from any kind of underground mines, the need for military protection to prevent wholesale assassination of the volunteer miners, the knowledge that only by the calling off of the strike by order of the United States District Court at Indian-

apolis was a terrible calamity averted, all these *ugly facts* which the Supreme Court of the United States *cannot remake*, taught the people of Kansas that as a *matter of fact* coal mining *is* impressed with a public interest. The destruction of transportation facilities, whether by car shortage or by a strike upon the railroads, as a matter of *hard fact* has often deprived the Kansas farmer of his only available *market* for *livestock*. *Strikes* and *lockouts* in the *packing industry* of the state have many times in the past deprived the Kansas farmer of his only available *market* for *livestock*. As a matter of *fact*, it makes no difference to the Kansas farmer whether the blockade affects *transportation* or *meat packing*. In either case, such a temporary loss of his market inflicts an irreparable loss upon him and through him seriously affects the prosperity of the entire state. Such is the difference between *law* and *fact*.

But, as a matter of *Law* the earth was *flat* in Galileo's day.

CURRENT LEGAL LITERATURE

A Department Devoted to Recent Books in Law and Neighboring Fields and to Brief Mention of Interesting and Significant Contributions Appearing in the Current Legal Periodicals

Among Recent Books

INTERNATIONAL Law and Some Current Illusions and Other Essays. By John Bassett Moore, LL. D. The Macmillan Company. 1924. pp. 381. $4. The publication of a new work on international law by so eminent an authority as Judge Moore must be received with interest and enthusiasm by all who have any acquaintance with the subject, whether as lawyers, students or political economists. Judge Moore's latest book is a collection of addresses and essays with which many of his innumerable admirers here and abroad are already familiar. The collection published in one volume is none the less interesting for this fact, particularly as the artcles in question cover the period from 1912 to 1924, and deal, in a measure, with the great jurist's conceptions of international law before the World War, and contain in the main essay—"International Law and Some Current Illusions," the stoutest defense of those principles to which he had devoted a lifetime. With some of Judge Moore's arguments and conclusions in the essay from which the volume takes its name many students will doubtless disagree. In his introductory note the author informs us that

> The immediate object of the publication of the present volume, and particularly of the paper which gives to it its distinctive title, is to contribute something towards the restoration of that sanity of thinking and legal and historical perspective which the recent so-called World War has so seriously disturbed.

He proceeds to show that, contrary to the familiar view, the Great War was not unique as a world conflict or in the extent of the drafts made by the War on National man power and resources. According to Judge Moore there is nothing novel in the claims of the combatants that the extent to which all classes of citizens contributed to the war-making power made it difficult to accept the theretofore well recognized distinction between "armed forces" and "the civilian population."

He further challenges the claim that the practical merger of merchandise classed as "conditionally contraband" into the class of "absolutely contraband" was justified by the peculiar circumstances of the War. It is a fact that in the year 1918, for all practical purposes, the distinction between "conditional contraband" and "absolute contraband" had ceased to exist.

It may seem to some who are familiar with the extent to which the World War modified or did away with what seemed to be well established rules as to the rights of non-combatants, the protection of property not in military use, contraband of war, etc., that the statement that conditions existing in the World War were not unique constitutes an added ground for disillusionment and a loss of faith.

Many of us would prefer to believe that conditions existing during the World War were unprecedented and resulted in a breakdown of accepted legal principles. To argue otherwise must lead to the conclusion that modern civilization has consciously relegated international law to the realm of pure speculation.

Judge Moore quotes from an article of Judge Cardozo of the New York Court of Appeals ("The Nature of the Judicial Process"), as follows:

> The life of the law has not been logic; it has been experience.

Does not the experience of the Great War teach us that, where the conflict is severe enough, and the belligerents powerful enough, desperate measures will be used to meet desperate conditions—quite regardless of rules of international law to the contrary? If the experience of the Great War has taught anything, it has taught the necessity for some sanction for international law other than treatises or codes, and one's sense of discouragement is changed into one of hope by the organization of the League of Nations and the Permanent Court of International Justice.

The volume contains a most admirable essay on this court, with the statute, and rules of procedure, included as an appendix.

The two chapters entitled, "The Passion for Uniformity," and "Relativity," are full of deep, philosophic

thought, and are written in Judge Moore's most engaging manner.

The other essays are, "Contraband of War," an address delivered in 1912, "International Arbitration," 1914, "Rules of Warfare," being an account of the proceedings of the Hague Conference, 1922-1923; "Law and Organization," 1914, and "Suggestion for a School of Jurisprudence," 1915.

The volume will prove not only of absorbing interest, but of the greatest practical utility to students of international law, and all others who are interested in furthering the cause of judicial settlement of international disputes.

Preparation of International Claims. By George Cyrus Thorpe. West Publishing Company, 1924. pp. 280. $5.00.—This work is written for the guidance and information of practicing lawyers who may have occasion to prepare and submit foreign claims for clients.

The introductory chapter contains a brief history of the development of international arbitration.

Other chapters deal with the general principles of international law which are most likely to arise in considering the validity of international claims, State Department Regulations, procedure, evidence, etc.

The volume will doubtless be of great value, in the language of the author, "to furnish a practical and concise guide for the use of lawyers" in the preparation of claims before international arbitral tribunals "or Claims Commissions." The subject dealt with in this volume, however, is highly specialized and covers in a practical manner the entire domain of international law. Arbitral tribunals and Treaty Claims Commissions usually adopt special rules of their own regarding pleadings and procedure, and it would have been impossible within the limits of the present volume to do more than touch upon general principles with adequate reference to generally accepted precedents.

The British Year Book of International Law. Editors, Sir Cecil Hurst, K. C. B., K. C. and Professor A. Pearce Higgins, C. B. E., K. C., LL. D. Oxford University Press, American Branch. pp. 268. $5.35. —It would be impossible in the narrow space allotted to the reviewer of this volume to adequately discuss the ten leading articles which it contains. There are contributions by leading British authorities on such varied and important topics as the Occupation of the Ruhr, the Soviet Government and Russian Property in Foreign Countries, the Monroe Doctrine, the League of Nations and Grounds of Intervention in International Law.

In addition to these leading articles, the book contains, as an appendix, the text, with appropriate comments, of the principal treaties, decisions, opinions and awards of international tribunals up to the end of the year 1923, with a very complete bibliography of international law, from May 1st, 1923, to April 30th, 1924. With its very complete index, the British Year Book of International Law constitutes a very valuable book of reference, in addition to the notable contributions on the general subject which have been mentioned above.

PAUL FULLER, JR.

New York.

The Trading with the Enemy Act, as enacted and amended, with annotations by Iredell Meares, Washington, 1924. Published by the author, 711 p. $10.00. —*The Confiscation Fact,* or *National Honor Demands Return of Enemy-Owned Property.* Washington, 1924. 71 p. $1.00.—The author of this compilation was for some years an attorney in the Bureau of Law of the Alien Property Custodian, and has in the first of the works above-mentioned annotated the Act of October 6, 1917, and its amendments, by section and paragraph. He subsumes under each head the judicial decisions and the executive and administrative orders relating thereto. The Act is in part not easy to comprehend, because, as the author points out, a measure designed as an act of conservation was, through misguided patriotism, converted administratively into an act of confiscation. The Act is very technical, and those having to deal with it will appreciate the aid furnished by Mr. Meares' work. The book contains an introduction by Mr. Le Fevre, a well-known attorney of Washington, formerly connected with the Custodian's office and an addendum reprinting an opinion by John Bassett Moore on war, as *force majeure,* in its effects on commercial intercourse. An appendix reprints the important section 9 of the Act and its Amendments, and numerous Senate or Joint Resolutions, treaty provisions, statutes, executive orders and forms relating to the interpretation or administration of the Act. A useful table of cases digested and an index complete the volume.

In the second named pamphlet, entitled "The Confiscation Fact," the author traces the American policy under the Act, which began lawfully as a measure of conservation, into its subsequent extraordinary evolution as a measure of confiscation. He analyzes the Amendment of March 28, 1918, which conferred on the Custodian a general power of sale and avers that this has resulted in the plunder of the enemy-owned private property, contrary to the original avowal of Congress and the Executive promise to the owners, contrary to international law and our treaties, contrary to elementary conceptions of morality and national self-interest. The author has apparently come to his earnest convictions as the result of long observation of the Act and of its administration. He discusses the various steps taken under the Act and the policy pursued with respect to different types of private property seized, including debts, United States bonds, real estate, art treasures, patents and trademarks, as well as the use made of the power of sale, the so-called "Americanization" of foreign-owned private property, and many other details. He concludes that outright confiscation on a vast scale has already taken place, and deprecates the subversive effects of this policy, in the present and in the future. It can hardly be doubted that the law and the public faith and policy of the United States have suffered a grievous injury. The security of acquisitions, one of the main functions of the law, has been seriously weakened, both at home and abroad, and precedents have been created which are likely to prove very costly. The author finds the strongest support for his views on policy in the writings of America's foremost international lawyer, John Bassett Moore, as presented in the first chapter of his recent work, "International Law and Some Current Illusions," partially reprinted in Senate Document 208, 68th Cong. 2nd sess.

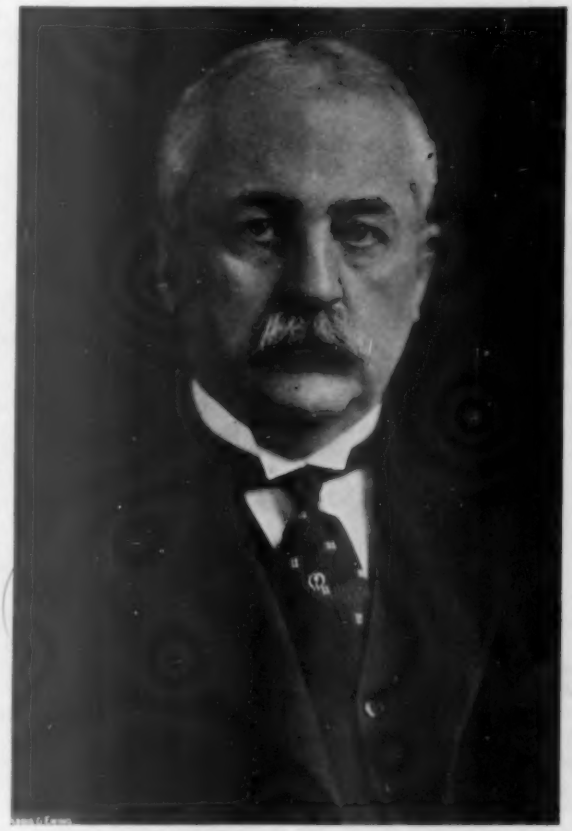
EDWIN M. BORCHARD.
Yale University.

Contributions

The articles and letters contributed to the JOURNAL are signed with the names or initials of the writers and BOARD OF EDITORS assumes no responsibility for the opinions expressed therein.

CORDENIO ARNOLD SEVERANCE: 1862-1925

THERE are some men of whose life and personality one can perhaps get a fair idea from the collection of successive dates, positions held, prominent activities and the like which constitute the natural material of memorials. But this is emphatically not true of the late Cordenio A. Severance, former president of the American Bar Association, whose death at Pasadena, California, on May 6, was noted in the May issue of the JOURNAL. He lived a life too full and abounding in varied interests to be adequately represented in that semi-statistical way. He had to an unusual degree what we call "personality," and it is the man himself and not merely what he did professionally and otherwise that stands out most clearly in the recollection of those who came in contact with him. There are two modes of achievement in human careers: to do something and to be something; and the latter is perhaps more important than the former. Mr. Severance was the type of man who was successful in both modes.



CORDENIO ARNOLD SEVERANCE

His interests embraced not only his profession and all that makes for the elevation of its standards and the improvement of the law in general, but agriculture, music and art, outdoor life, animals, business, and by no means least important, his fellow men. He was one of the most sociable of men and the conventional expression "he was a man of broad human sympathies" is really apt description in his case. This quality manifested itself in his relations with his fellow citizens of whatever walk in life, as well as in the cultivation of the fine art of social intercourse which he and Mrs. Severance illustrated so charmingly at his attractive home, "Cedarhurst," near Cottage Grove, Minn., only a few miles out from St. Paul. Of Mr. Severance as a lawyer of national distinction a capable friend has written so well in a former issue of the JOURNAL (Sept., 1921, p. 453) that little need be added here. As President of the American Bar Association he brought to the discharge of the duties of the position all the energy and enthusiasm for which he was so well known. It is largely due to his efforts that the San Francisco meeting of the Association achieved such a remarkable success and remains such a happy memory for those who attended it.

Cordenio Arnold Severance was born at Mantorville, Minnesota, on June 30, 1862. He was the son of Erasmus C. Severance and Amanda Julia Arnold Severance, and both his parents were of New England ancestry. He was a descendant of John Severance, who came from Ipswich, England, to settle in New England in 1637. Representatives of the family served in the War of the Revolution and other early American wars. Erasmus C. Severance early removed from Pennsylvania to Minnesota, where he held an important position in the affairs of his day.

He was educated in the public schools of Mantorville and later at Carleton College of Northfield, Minnesota, an institution which subsequently conferred upon him the honorary degree of Doctor of Laws. He studied law in the office of Robert Taylor, one of the leading attorneys of the State at Kasson, Minnesota. He was admitted to the Bar in Minnesota in 1883, and in 1885 entered the law office of Cushman K. Davis, formerly Governor and subsequently for many years Senator from Minnesota.

In 1887 Mr. Severance joined with Senator Davis and Frank B. Kellogg, formerly Senator from Minnesota and Ambassador to England and now Secretary of State, in forming the partnership of Davis, Kellogg & Severance, a partnership which continued until the death of Senator Davis and which became one of the well-known law firms of the country. Robert E. Olds was afterward admitted to the firm, and when Mr. Kellogg retired from practice to take his place in the Senate, the firm name was changed to Davis, Severance & Olds. Later, when Mr. Olds retired from active practice in 1918, to act as representative of the American Red Cross in Paris, and George W. Morgan became a member of the firm, the name was changed to Davis, Severance & Morgan.

In 1889 Mr. Severance was married to Mary Frances Harriman, daughter of General Samuel Harriman of Wisconsin who survives him.

Besides being President of the American Bar Association in 1921-1922, Mr. Severance was President of the Minnesota State Bar Association and of the Bar Association of Ramsey County, the county in which St. Paul is located. He was a member of the Commission on Uniform State Laws, of the Council on Foreign Relations, of the Council of the American Law Institute, a Trustee of the Carnegie Foundation for International Peace, a Trustee of Carleton College of Northfield, Minnesota, and a director of other institutions.

During the Great War, Mr. Severance temporarily gave up his practice and went to the Balkan Peninsula as head of the Red Cross Commission for the relief of Serbia, spending months in Southern Serbia and Macedonia. In 1920, as a Trustee of the Carnegie Foundation, he visited Belgrade, the capital of Serbia, to arrange for the construction of a library donated to the University of Belgrade by the Foundation.

Mr. Severance had devoted himself actively to the practice of law since 1883. He had a wide, diversified and distinguished practice. Among other important litigation, as Special Assistant to the Attorney General, he represented the Government in its action under the Sherman Anti-Trust Law against the Union Pacific and Southern Pacific Railroads, arguing the case in the trial court and the Supreme Court. The decision of the United States Supreme Court in 1912 for dissolving the merger was regarded not only as a notable triumph for the Government, but as a personal victory for Mr. Severance. He was one of the counsel for the defendant in the Government suit to dissolve the United States Steel Corporation, participating actively in the trial and argument of the case, which resulted in a decision in favor of the corporation. His last argument in court was made as one of the attorneys for the International Harvester Company in the Circuit Court of Appeals for the Eighth Circuit last October in St. Paul, in a proceeding brought by the Government for further relief against the Harvester Company under the Sherman Act, in which the Court has just dismissed the Government's petition.

The following extracts from a well written appreciation appearing in the St. Paul Pioneer-Press give some interesting personal details that enable one to understand better the wide-spread sense of loss that followed the announcement of Mr. Severance's death:

"For years the Severance country place, Cedarhurst, near Cottage Grove, Minn., has been the scene of entertainment on a manorial scale. Due to extensive travel, as well as to the international scope of Mr. Severance's professional interests, his acquaintanceship included notables from all parts of the world, so that Cedarhurst has for years been included in the itinerary of nearly all celebrated visitors, American and European, to the Northwest.

"Mr. Severance's remarkably developed gift for forming and maintaining not only friendships, but social relationships of every degree, was the logical result of a boundless enthusiasm and interests so diversified as to prove a source of never-ending wonder and delight to every one who knew him. Coupled with these assets were a keen sense of humor and a phenomenal memory, not only for events but for the faces and names of individuals whom he had encountered, even though casually. And although he was in a very real sense a citizen of the world, Mr. Severance always regarded himself as a member of the community at Cottage Grove. He knew all its older residents and kept track of the two generations which had arisen there during his residence.

"He took an active interest in the welfare of schools and churches and was in touch with commercial conditions. Weddings and funerals in the families of his friends there nearly always found him present unless he happened to be in another part of the world, and his boyhood years on a farm planted in him a lifelong interest in the affairs of farming communities.

"Nor was it alone an interest. He spoke with the authority of special practical knowledge on agricultural matters and stock-raising. The Cedarhurst estate includes a farm of more than 500 acres, and Mr. Severance was in touch with the management of all its affairs, and able at any time to give intelligent advice concerning them. The beautiful gardens surrounding his home were a source of great pride and delight to him, and he seemed to regard every tree on the premises with a real affection.

"A love of animals manifested itself particularly in the thoroughbred collie dogs for which the Cedarhurst kennels have long been famous. Here he kept about 40 grown dogs, most of them prize-winners in various exhibitions, and the puppies he often gave to his friends.

"Mr. Severance's extensive professional affiliations kept him in close and important touch with financial interests not only throughout the United States, but in Europe as well, and he was as much at home in European capitals and their official circles as in Washington. He was widely consulted as an authority on large investments and the general condition of world markets with the economic causes underlying phases and developments.

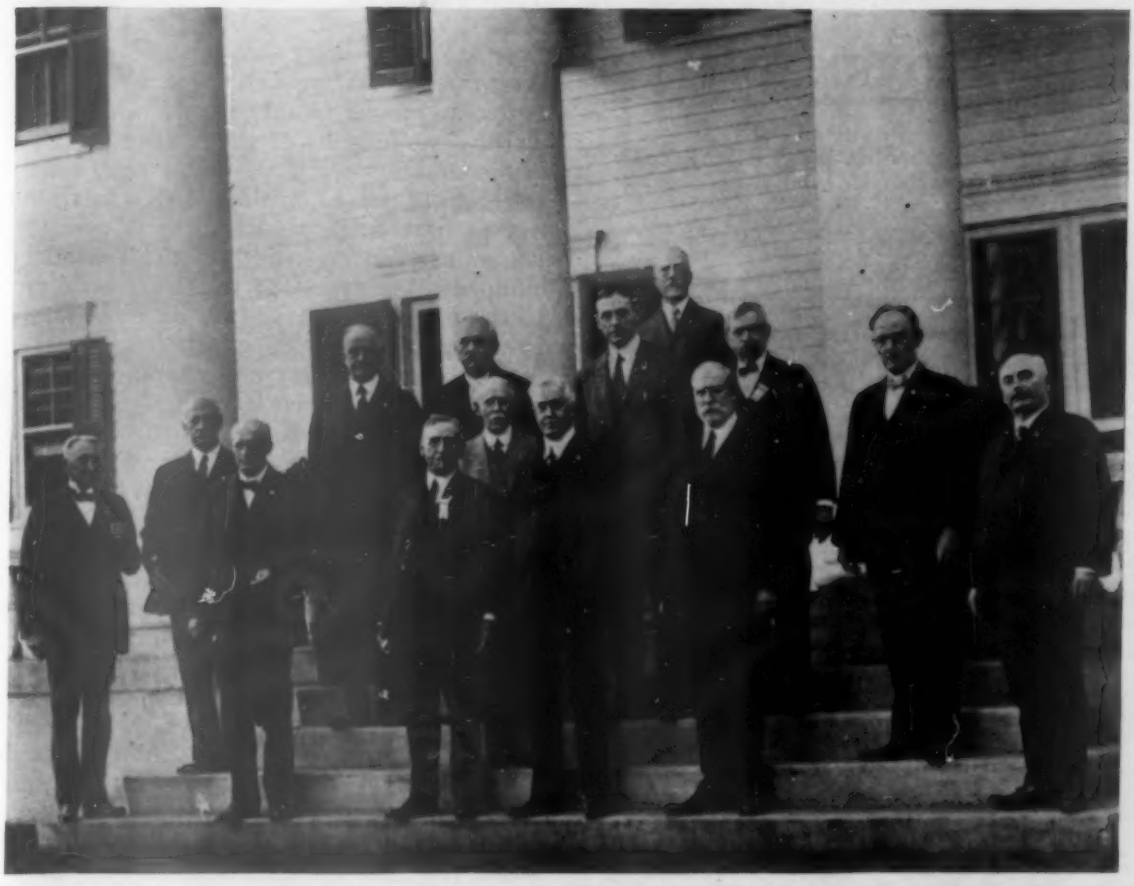
"A man of striking good looks and cordial manner, Mr. Severance was everywhere regarded as a highly desirable figure in any social group. His was a remarkable conversational gift, made up of quick wit, genuine interest in people, and an inexhaustable fund of general information. He was in great demand everywhere as an after-dinner speaker and toastmaster and enjoyed a national reputation as a raconteur, especially of humorous stories.

"Although so much of his keen mental activity was directed in channels having to do with strictly business and professional affairs, the aesthetic interests found a large place in his life. Very early in life he manifested a decided taste for music and this was cultivated largely through a study of the 'cello, as well as through enthusiastic patronage of music in all its creditable forms. A steady subscriber to and warm supporter of the St. Paul and Minneapolis Symphony orchestras, he also attended all such concerts in other cities as opportunity permitted, and Walter Damrosch, veteran conductor of the New York Symphony society, was numbered among his close personal friends, as was Emil Oberhoffer, former conductor of the Minneapolis Symphony orchestra.

"This interest in music took shape, a few years ago, in the installation at Cedarhurst of a pipe organ in which Mr. Severance took especial delight and which figured in some of the many informal concerts of which the big music room was the scene.

"His personal library, one of the most complete in the West, was another source of pride and delight. Himself a thorough student of history, Mr. Severance had acquired many rare and valuable books on the subject, some of them editions long out of print. Like many men who have had a share in the larger affairs of life, he found keen interest in the career of Napoleon, and was the possessor of numerous volumes on the man and his period. However, the scope of his literary taste was broad and on his shelves were to be found works in an unlimited variety.

"But it probably will be for his warmly endearing personal qualities that Mr. Severance will be best remembered. His affection, not only for those who came into intimate contact with him but for the friends he made through the years, was characterized by a loyalty which made it impossible for him to say unkind personal things himself, and made him intolerant of unkind criticisms as uttered by others. His personal



Photograph of Secretary Hughes and members of the Executive Committee of the American Bar Association taken in the summer of 1923 at "Cedarhurst," Mr. Severance's home. Reading from left to right: John B. Corliss, William Brosmith, Thomas W. Shelton, A. T. Stovall, Thomas W. Blackburn, Cordenio A. Severance, Frederick E. Wadhams, John W. Davis, W. Thomas Kemp, Edgar Bronson Tolman, Charles E. Hughes, W. O. Hart, S. E. Ellsworth, John T. Richards.

affections included the children and grandchildren of his friends, and in their affairs he took a very real interest.

"His material contributions to patriotic and charitable causes totaled enormous amounts, for his generosity of hand paralleled his generosity of mind. There can be no accurate computation of the help he bestowed privately on needy individuals. Many a boy owes his education to timely help from Mr. Severance's sympathetic hand. Many an unfortunate citizen, incapacitated through illness or disaster, has been quietly helped back to usefulness and self-reliance. For abounding human sympathy was, after all, the trait which distinguished this man from many others of perhaps equal professional prominence and intellectual attainment."

Chairman Long Addresses Bar Associations

Hon. Chester I. Long, Chairman of the General Council of the American Bar Association, recently was the guest of honor at a dinner given by the Bar Association of Dallas, Texas. He spoke on "Our Dual Government," warning against the tendency at present so prevalent to reduce the states to a position inferior to that called for by our constitutional scheme. On February 28, 1925, Mr. Long spoke to the Chicago Bar Association on "The Legal Aspects of the Movement for Uniform State Laws."

Death of Bradner W. Lee

Bradner W. Lee, former president of the California Bar Association and one of the most eminent and respected members of the Los Angeles bar, died at Los Angeles on April 28.

Upon the announcement of Mr. Lee's death at the luncheon of the Bar Association of San Francisco yesterday, on motion of former Chief Justice F. M. Angellotti, President Beverly L. Hodghead was directed to wire to the Los Angeles County Bar Association and to the family of the deceased the regrets and sympathy of the Bar Association of San Francisco in the death of Mr. Lee.

George F. McNoble, president of the California Bar Association, when notified at Stockton of the death of Mr. Lee, wired expressions of sympathy on behalf of the association and appointed John G. Mott, Thomas C. Ridgway and Thomas W. Robinson a committee to represent the California Bar Association at the funeral and to present a suitable wreath on behalf of the bar of the state.—*San Francisco Recorder.*

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Subscription price to individuals, not members of the Association nor of its Section of Comparative Law, $3 a year. To those who are members of the Association (and so of the Section), the price is $1.50, and is included in their annual dues, $6. Price per copy 25 cents.

Office: 1612 First National Bank Bldg., 38 South Dearborn Street, Chicago, Illinois

"WHY DOESN'T THE BAR DO SOMETHING?"

When a situation arises or an incident occurs in connection with the administration of justice that seems to call for condemnation or drastic action, one is quite likely to hear the question on the street or read it in the newspapers, "why doesn't the bar do something?" There seems to be an impression that the bar is armed with plenary powers to correct on the spot any abuse that may arise, and that it often refrains from exercising it; and another equally fatuous impression, that the way to correct defects in the administration of justice is merely to deal with the individual incidents as they arise. Certainly few laymen in our country, profoundly as they are affected by everything that concerns the administration of the law, have any idea of what the bar is really doing—of the tremendous sweep of the present movement on the part of the legal profession to improve conditions. Nor do they realize that in order to achieve any measure of permanent success the attack must be on the fundamental causes of defects and not merely a hasty response to an occasional alarm bell.

The bar is doing something. Never before in the history of our country was there such an organized and concerted attack by the legal profession on the things that interfere with the proper administration of justice. The bar has launched a campaign to raise the educational standards for those who seek admission to the profession. The bar is attempting in various states to secure the incorporation of the profession as a whole in order that it may have the full control and discipline over its membership that has been shown to work so successfully in England. The bar, through the grievance committees of state and local associations, is dealing more vigorously than ever with unworthy members of the profession. The bar is standing forth more and more for the selection of judges on the score of merit and not of partisanship. The bar is doing all it can to secure for judges the reasonable compensation necessary to attract good men to the bench and keep them on it. The bar is aiding in the improvement in the organization of the courts and methods of procedure. The bar is standing out against efforts to deprive the judges of our federal system of the powers which have proved so efficient an aid to justice. The bar is pointing out to the legislatures from time to time the need of removing statutory obstacles to the administration of the law and of making statutory changes which will assist it.

The bar is backing, and certain of its members are executing, one of the greatest movements in our entire national history,—that for the simplification of law. This significant undertaking, epic in conception and tremendous in scope, would by itself be a sufficient answer to the question, "why doesn't the bar do something?" Far from being the mere apostles of conservatism and the devotees of *laissez faire,* leading members of the profession have banded together to meet one of the most pressing needs of American life,—none the less pressing because the average man has little conception of it. The American Law Institute is attempting a restatement of law which will clarify principles, remove uncertainties, reconcile contradictions and relieve both bench and bar from the crushing weight of an accumulating body of decisions and reports which no human being could be familiar with, and which is being handled with the greatest difficulty even with the help of all the digests and aids now in use. In the noblest, most efficient and, as far as the general public are concerned, probably the most unappreciated sense of the phrase, the bar is doing something.

So much for the bar. What about the other people? What are they doing? Read this significant little extract from the recent letter of President Hughes to members of the American Bar Association: "The bill sponsored by the Association relating to arbitration in the field of maritime and interstate commercial transactions has been

enacted by the Congress and approved, thus facilitating the speedy adjustment of disputes. But while we have this measure of success, the failure of other bills which the Association urgently pressed is greatly to be regretted. Mention may be made of the bill to give to the Supreme Court of the United States, in the interest of simple and uniform procedure, the authority to make rules to govern the practice on the common law side of the Federal Courts and the bill to increase, to a reasonable extent, the salaries of Federal Judges. These bills will be urged again in the next Congress. Lawyers should not be held responsible for defects in procedure if legislative bodies refuse to give heed to the demands for the simplification of practice and for the maintenance of an able and efficient judiciary."

Here is another interesting and pertinent exhibit from the *San Francisco Recorder:* "By withholding his signature from the self-governing bar bill in the fact of the fact that practically every judge of the higher courts, many judges of the superior courts and hundreds of lawyers from all parts of the state asked him to sign it, Governor Richardson has compelled the Bar Association to mark time for another two years pending more favorable action following another session of the legislature upon this self-governing bar measure . . . California is endeavoring to establish a system of government of the bar that will enable the lawyers to remove the unmerited stigma that the unthinking place upon the legal profession, action which the present law does not make possible. Having criticized the bar for its ineffectiveness in this regard, it ill becomes the authorities having the power to withhold from the bar the necessary weapons once they have set themselves to meet the challenge of public criticism."

Here are two apt answers to the question, "why doesn't the bar do something?" and they are worth noting. There are two parties at least to every change relating to the administration of justice. One of them is usually the bar and the other is the public or the public's representative, Congress, the legislature or some public officer. Although cooperation is often extended, quite frequently the bar wants to do something, but finds itself blocked by the other necessary party to the transaction. In such cases it is manifestly unfair to charge the bar with responsibility for a situation which it is not permitted to attempt to remedy according to its well thought out plans. When the public comes to ask occasionally the question, "why doesn't Congress, the legislature, the executive, let the bar do something?" it will have attained a clearer idea of the situation and the way will be made considerably easier for some needed improvements in the law.

A PRIMER FOR JURORS

There is probably a constructive suggestion for the rest of the country in the little primer of instructions to jurors issued in the second judicial district of New York and signed by fifteen Supreme Court Justices. In view of the importance of the juror as an agency in the administration of justice, anything that promises to aid him to a clearer understanding of the exact function of the court and the lawyers and, in particular, of his own duty is worth careful consideration. And certainly a brief statement, written so that any fairly intelligent layman can understand it, and carefully prepared by those who are particularly competent in the matter, would seem admirably calculated to serve this purpose.

The primer is printed in full on another page of this issue because of the evidences of interest in it which were received after the publication of a brief notice on the subject in the Current Events Department in the May issue. A number of letters were received from judges and others who apparently felt that it contained a suggestion which might possibly be adopted with profit in their own district. These letters furnished a very striking illustration of the alertness of bench and bar and their eagerness to investigate any plan which seems to offer a practical method of improving any detail in the administration of justice.

The form of question and answer in which the primer is cast makes it easy to read and easy to understand. All the questions are fundamental and the answers go straight to the heart of the matter. The final general observations as to the proper attitude of the juror towards the litigants fitly emphasize the duty of impartiality and of honest search for truth. The writers of the primer are fully justified in concluding with the statement that "Jurors who conform to the foregoing elementary requirements and the more detailed specific instructions of the judge in his charge will be properly performing one of the loftiest functions given to any man to perform, that of doing justice between his fellow men."

CURRENT LEGISLATION

Automobiles and Crime

By J. P. CHAMBERLAIN

THE automobile is responsible for a goodly number of the bills which the state legislatures have annually to consider and figures largely in the annual or biennial product of laws. Old rules must be adjusted to conditions created by the automobile, new rules developed to meet new difficulties; the necessity of new acts to adapt the statute law to changing conditions is nowhere better evidenced than in automobile legislation. Such of the volumes of session laws of 1925 as are available show that the process of adjustment is not yet completed.

One of the serious criticisms of our American legislation, including in acts detailed regulations which should be left to the administrative authority, is patent in automobile legislation. It would reduce the flood of legislation if, where the state constitutions allow it, provisions like that of the District of Columbia Traffic Act, 1925,[1] were more generally followed. Section 6-b of that Act authorizes the Director "(1) to make reasonable regulations with respect to brakes, horns, lights, mufflers, and other equipment, the speed and parking of vehicles, the registration of motor vehicles, the issuance and revocation of operators' permits, and such other regulations with respect to the control of traffic in the District not in conflict with any law of the United States as are deemed advisable, which regulations shall remain in force until revoked by the director with the approval of the commissioners of the District, and (2) to prescribe within the limitations of this Act reasonable penalties of fine, or imprisonment not to exceed ten days in lieu of or in addition to any fine, for the violation of any such regulation."

Every time a statute lays down regulations in respect to the character of automobile horns and lights it is certain that future volumes of session laws will be burdened by amendments, and the time of future legislatures will be taken up by manufacturers of new devices seeking to secure a modification in the act which will permit their product to be used in compliance with the law. This is surely not a necessary consequence of the constitutional rule against delegation of legislative authority.

The Journal for November, 1924,[2] contained a note on one phase of this adjustment of our legal system to the automobile, in respect to the liability of automobile owners. The statute there commented on[3] made the owner of a vehicle liable for accidents resulting from its operation, and in the note attention was called to the possibility that the conditional vendor of an automobile might be liable for any accident happening to the car. This situation has been taken care of by an amendment to the Act,[4] which expressly provides that a conditional vendor shall not be deemed an owner.

The importance of automobiles in prohibition legislation and the stringent penalty of forfeiture is well known and will not be dealt with in this article, but it is proposed here to deal with general criminal legislation especially involving motor vehicles.

The ease with which the motor vehicle can be used to perpetrate the crime of robbery has induced the legislatures to attach a special stringent punishment to robberies perpetrated with the use of automobiles. Indiana, Chap. 32, 1921, sets up the crime of automobile banditry, a felony committed by two or more persons who have an automobile, airplane or other self-moving appliance in which they attempt or intend to escape, or who use such a conveyance in attempting to escape after committing a felony. The seriousness of the crime is shown by the penalty which is ten to twenty-five years in prison. The legislature of Missouri, 1921, p. 280, punishes the person who uses a motor vehicle either to assist in or escape from a robbery, no matter of what degree, as guilty of robbery in the first degree. New York Chapter 504, 1923, makes a robber who uses a motor vehicle in the commission of his crime guilty of robbery in the first degree. The voice of the farmer is heard in Connecticut Chapter 189, 1921, which punishes severely any person who uses or permits to be used "any vehicle in the larceny of agricultural products or in receiving or concealing any stolen agricultural products. Evidently it is the use of the motor vehicle as an aid to theft of farm products which inspired this statute, though it is not limited to motor vehicles. New Jersey Chapter 80, 1923, tries to protect the farmers with a different penalty. That statute requires a report to the Commissioner of Motor Vehicles of conviction for theft of produce from a farm in the state, of any person licensed to drive a motor vehicle "in this state or in any other state" together with the recommendation of the court in respect to action to be taken "against the license of such a person." Instead of inflicting a more severe criminal punishment the legislature has deemed that it could protect the farmer better by taking steps to deprive the thief of his license.

A criminal is not apt to use his own machine to aid in committing a crime or escaping from the scene of a crime, but is more likely to take that of another person, thus rendering his identification by means of the number plate of the car impossible. This simple means of rendering crime easier and conviction harder has received the attention of the legislatures. Another reason for punishing taking cars without permission is the ease with which they may be stolen and the necessity for giving the police easy means of dealing with automobile theft.

1. Public No. 561, 68th Congress, 1925.
2. American Bar Association Journal, November, 1924. Automobiles and Vicarious Liability.
3. Laws of New York, 1924, Chapter 534.
4. Laws of New York, 1925, Crapter 167.

As examples of legislative attempts to cope with this situation, Connecticut in 1921, Chapter 17, makes it a felony for a person to use an automobile or auto truck belonging to another without the owner's consent, even though he intends to use it temporarily and afterwards abandon it or return it. Idaho in the same year by Chapter 114 makes a similar provision, and New Jersey in 1923 by Chapter 208, punishes such use by fine of not over $1,000 or imprisonment for one year or both and not over ten years for a second, or fifteen years for any subsequent offense[5].

Congress in the District of Columbia Traffic Act has unearthed and dealt with another means of concealing the identity of a car. The act forbids the use of smoke screen devices in automobiles subject to the penalty of a penitentiary sentence. Evidently the Washington bootlegger has learned something from recent developments in military art. Legislatures in 1926 will probably be found coming to the rescue of the police against this new device in the war between police and criminals.

The Ohio Legislature in 1923, p. 58, found it necessary to increase the penalties punishing the offense of driving another's automobile without his permission as the alternative fine of the old act is abolished and the punishment made a jail sentence. Massachusetts in 1924, Chapter 183, penalizes any person who knowingly permits the license to operate his motor vehicle to be used by another person, thus reaching another possible serious danger in criminal use of automobiles. The license as a means of identification and the power to revoke a license as a means of discipline, make it important that the holder of a license should be held responsible under penalty of the criminal law for the proper use of his license.

The danger to the public of careless operation of an automobile has led to stringent legislation punishing improper use of a motor vehicle on the public highway. Statutes especially punishing driving an automobile, when intoxicated had begun to be common before the Volstead Act was passed, but the operation of that act has not limited the output of this type of legislation. It is also noticeable that the penalty in these statutes has been steadily increased in new acts or by amendments of former acts, as the seriousness of the problem has become more evident. The strong feeling in the country today that the ignominy of a jail sentence should be imposed upon all persons who are so callous to the rights and interests of others as to drive an automobile on the roads when not in a condition to control it finds its expression in the session laws. The District of Columbia Traffic Act, 1925, for a first offense makes the punishment a fine and sixty days to six months in prison, for the second and subsequent offenses, a fine and from six months to one year in prison. The operator's permit of the person convicted shall also be at once revoked. In Oregon by Chapter 182, 1925, the offender is guilty of a misdemeanor punishable by fine and imprisonment from sixty days to six months and his license is automatically revoked for a year. As additional penalty, for the first offense, the vehicle being driven is, if owned by the convicted person, held in the custody of the sheriff for from thirty days to six months, except that the court may permit a member of the family of the convicted person to use it; for the second offense the car is held for from six months to a year and the judge is not allowed to permit it to be used by anyone. Thus a certain degree of vicarious punishment is visited upon the family of the intoxicated automobilist. Vermont Temporary No. 147, Section 87, 1925, the new Automobile Code, makes the punishment for all convictions for intoxication when driving, after the first, prison from two months to two years and the Secretary of State is to revoke the license and not grant a new license for three years for a first offense, or for six years after the second offense. If a person offends the third time the legislature refuses to allow him another license in the state of Vermont. New York by Chapter 318, 1925, makes the second conviction as for a felony and sets the punishment at imprisonment from sixty days to two years. In 1923 by Chapter 28, Arizona set a jail penalty of from thirty to ninety days for the first offense, for the second offense the jail sentence was six months and the convicted person prohibited from driving a motor vehicle for a year. If he is a "public chauffeur" his license is cancelled and in case of the second offense he can have no new license for a year. In New Hampshire in 1923, by Chapter 77, operating a motor car when intoxicated is punishable by prison for sixty days and a revocation of the license to drive for one year; in case of a second offense the penalty is six months' imprisonment, the cost of procedure must be paid and the convicted person cannot get a license for three years, nor in such cases may the court suspend the sentence. In 1924 there were a number of such statutes. Notable among them is Kentucky Chapter 46, which in addition to providing a jail sentence of thirty days to six months for the second and each subsequent offense brings out another interesting element in American criminal law. Any sheriff or peace officer is fined for each case of failure rigidly to enforce this statute.[6]

Another way of bringing to a person his responsibility in the use of an automobile is applied by the Oregon Legislature, Chapter 182, 1925, which makes guilty of manslaughter the intoxicated driver of a motor vehicle by which a person is killed. In 1923 none of the states went so far, but there are a number of instances where it is made a felony recklessly to cause the death of another while driving a motor vehicle while under the influence of intoxicating liquors or narcotics[7].

In addition to the punishment for driving when intoxicated some of the legislatures have established penalties for reckless driving. They do not always agree on the definition of reckless driving. New York in 1924, Chapter 360 defines it as using a motor vehicle "in such manner as to unnecessarily interfere with the free and proper use of the public highway or unnecessarily endanger users of the public highway," Michigan Chapter 186, 1923, punishes as reckless driving, operating a motor vehicle "in such manner as to endanger life and limb of any person or the safety of any property" on the public highway. New Hampshire Chapter 24, 1923, is satisfied with punishing any person

5. See also West Virginia 112, 1921; Wyoming 60, 1921, a similar provision is common.

6. Louisiana 78; South Carolina, p. 1167; New York 360; and in 1922, Arizona 28, and Arkansas 250.

7. Idaho, 154; Nevada 13, New Hampshire 77. Virginia 57, Colorado 95. The general law may make such killing manslaughter. See New York Penal Code §1053.

who "upon any way operates a vehicle recklessly . . . or so that the lives or safety of the public might be endangered or upon a bet, wager, or race, operates a vehicle for the purpose of making a record" and punishes the second offense by imprisonment from one month to one year. Nevada, 1923, Chapter 13, makes it unlawful to drive a vehicle "in a reckless manner" on any street or highway or in any other than a careful and prudent manner or faster than is reasonable and proper or at a rate of speed endangering "life, limb or property of any persons." Vermont, Temporary No. 114, 1925, is satisfied with requiring that motor vehicles shall not run on the public highway in a negligent or careless manner.

The ease with which an automobile after an accident can escape from the scene of the accident and leave no trace is responsible for the legislation found in most states requiring an automobile driver who has caused an accident to stop and give his address and license number to the police or the injured person and punishing him for not complying. New York Chapter 318, 1925, following a number of other states, limits this duty to a driver where the accident was caused by his "culpability," and makes it obligatory to notify the police only. This phrasing scarcely helps the motorist, who must decide, on his own risk, whether he was "culpable." It is simpler to make the duty general. Failure to obey the rule is sometimes a felony[8]. Thus the duty of an automobilist to identify himself at all times is considered not sufficiently guarded by the display of number plates and use of drivers' licenses, but a direct obligation is put upon him in case of accident by his car, to notify the police. In addition many states have what might be called Good Samaritan acts, requiring the automobilist who runs into another vehicle or person to render aid to the injured. For example, this duty is enjoined by West Virginia 112, Section 97, the Automobile Code of 1921, and Nevada Chapter 13 of the Laws of 1923.

The requirement that the driver give his name and address has been sustained against the claim that it made him a witness against himself, contrary to the State Constitution[9]. Says the Court of Appeals of New York, in People v. Rosenheimer: "When we bear in mind not only the great danger occasioned by the use of motor vehicles, but also the fact that the great speed at which they can be run enables the person causing injury to readily escape undetected, leaving parties injured in person or property unable to tell from whom they shall seek redress, I think it involves no violation of public policy or of the principles of personal liberty to enact that as a condition of operating such a machine the operator must waive his constitutional privilege and tell who he is to the party who has been injured or to the police authorities, if, indeed, requiring him to give such information is an impairment of his constitutional privilege, which we do not decide." The principle adopted in the cases, that a person has no right and only a privilege to drive an automobile on the public streets, and therefore must use his privilege subject to whatever limit the legislature choose to put upon it, seems too wide in view of the increasing number of machines. The true principle is that it is within the police power to make reasonable regulation of the use of motor vehicles. The police power allows the legislature subject to the scrutiny of the court, to limit rights, and it is wide enough to cover the need. The time has certainly come to admit that a motorist has right on the public highway, that he does not drive only on sufferance.

Recent novelties have already turned up in 1925 automobile police legislation. Vermont Chapter 114 goes a long way in limiting the right of an individual to use his own judgment as to how long he will continue his machine in use by allowing the Secretary of State to revoke a license for an automobile which "is in such poor mechanical condition as to make its use a direct danger." The bathing girls who have ornamented the windows of machines for the past year are on the way to extinction, if other states follow Idaho, Chapter 177, Section 5, which makes it unlawful to put stickers on wind shields or rear windows which will obstruct the vision of operators. Another means of enforcement in the Federal Act, requires garage owners to report all cars damaged by accident, thus giving the police another way of keeping track of reckless drivers or criminals who flee from accidents.

Recently an English sportsman is said to have sharply criticized the United States for allowing shooting of game animals from automobiles, often when the victims were blinded by headlights. Arizona by Chapter 27 of the Laws of 1923 took a step to prevent this very improper practice by forbidding any person to "hunt or shoot quail, white wings and doves" from many motor vehicle whether "it is in motion or standing still." That the legislature takes this matter very seriously is shown by the penalty which is imprisonment for thirty to ninety days and the cancellation of the hunting license which cannot be renewed for one year. Evidently in the opinion of their law makers, rabbits, deer, ducks, and other game need no protection from the auto sportsman in Arizona.

8. Wisconsin Laws, 1921, Chapter 69.
9. People v. Fordera (Calif.), 164 Pac., 22; People v. Diller, (Calif.), 143 Pac., 797; Ex Parte Kneedler, 243 Mo., 632; People v. Rosenheimer, 209 N. Y., 115.

Arbitration and the N. Y. Chamber of Commerce

At the April meeting of the New York Chamber of Commerce an oil portrait of Charles L. Bernheimer, Chairman of its Committee on Arbitration was hung in the assembly room in recognition of distinguished service, an honor not heretofore accorded a living member other than a President. Hon. Ogden L. Mills, Congressman from the Chamber's district, who introduced the United States Arbitration Bill in Congress, briefly analyzed its advantages and gracefully described the splendid work of Mr. Bernheimer. Mr. W. H. H. Piatt, Chairman, and Mr. Julius Henry Cohen, of the American Bar Association's Committee on Commerce, Trade and Commercial Law, which drafted the Arbitration law, were present as guests representing the Association, and President Hughes of the Association was elected an honorary member of the Chamber. The roster of honorary members evidences the high esteem in which the Chamber holds such membership. There are now but four, Mr. Eiihu Root, Mr. Charles Evans Hughes, General George W. Goethals, and Mr. Thomas A. Edison. The Chamber is the oldest commercial body in the world, having received its charter in 1768 from King George III.

DEPARTMENT OF PROFESSIONAL TECHNIQUE*

Capitalization of Corporations Issuing Shares Without Par Value

By WILLIAM D. MITCHELL
Of the St. Paul, Minnesota, Bar

ONE question of practical importance arising under statutes authorizing corporations to issue shares without par value, is what part of the consideration paid to the corporation for such shares constitutes fixed or stated capital not subject to impairment by payment of dividends and what part of the consideration may be treated as "paid in" or "initial" surplus, available for dividends. Such statutes have recently received much attention from law writers, and though the question above stated has been touched upon in some articles it has generally been without an expression of very definate conclusions.[1]

It has been suggested by accountants and lawyers that under statutes which do not require any stated or fixed capital stock to be represented by no par shares, the entire consideration received for the shares is fixed capital not available for dividends, with the result that it is legally impossible for such a corporation to provide a paid-in or initial surplus out of the consideration paid for such shares.[2]

In modern corporate financing it is often of practical importance that there be an initial surplus available for dividends. Where two corporations, each having a stated capital and shares with par value and surplus funds, are consolidated by transferring their properties to a new corporation issuing shares without par value in exchange for the stock of the old corporations, if the entire consideration paid to the new corporation for its no par value shares necessarily constitutes fixed capital not available for dividends, the stockholders, by the reorganization, will have capitalized the surplus funds of the constitutent companies and deprived themselves of dividends except out of subsequent earnings.

Again, in the organization or reorganization of a corporation with preferred shares having a par value, and common without par value, the marketability of the preferred among investors is diminished if the entire consideration for the common shares constitutes fixed capital and there is no initial or paid-in surplus sufficient to assure dividends to the preferred until earnings from operations are available.

The true rule seems to be that within the limits imposed by the statutes under which the corporation is organized, the question whether any part of the consideration paid for stock without par value may be treated as paid-in surplus available for dividends is a matter of contract between the stockholders, to be expressed in the certificate of incorporation or in some other appropriate form of corporate action.

The statutes of the various states authorizing shares without par value differ in their provisions and may be roughly classified as follows[3]:

1. Those which require a fixed or stated amount of capital and allow that part of the consideration received for the no par shares in excess of the stated capital to be treated as paid-in surplus available for dividends.

2. Those which provide that the entire consideration received by the corporation for its no par shares must be established as fixed capital not available for dividends.

3. Those which require no fixed or stated amount of capital stock and allow the corporation to determine what part, if any, of the consideration is fixed or stated capital and what part may be established as paid-in surplus available for dividends.

Of the first class the New York statute in force prior to 1921 is an example.[4] That statute, authorizing a corporation to issue shares without par value, required a statement in the certificate of incorporation of

(1) The authorized number of shares without par value;

(2) The amount of the authorized capital, not less than the amount of preferred stock, if any, plus not less than $5.00 per share for each authorized share of no par common stock.

There were further provisions that no par value shares could be sold for such price as might be stated in the certificate, or for the fair market value, or for such price as might be fixed by the stockholders, and prohibiting dividends "which shall reduce the amount of its capital below the amount stated in the certificate as the amount of capital with which the corporation will carry on business." Under these provisions, if the consideration paid for a share of no par stock exceeded that share's aliquot part of the stated capital, the excess could be treated as paid-in surplus available for dividends.

The present New York statute[5] gives incorporators the option of coming under class 1 or class 2. Under it the certificate must state the number of authorized shares of no par stock and either

*A clearing house of practical information as to points of law and procedure, better ways of doing things, pitfalls to be avoided, etc., arising from the actual experience of various members of the profession.

1. XXXVII Harvard Law Review, 464; 90 Central Law Journal, 170; 5 Minn. Law Review, 493; 21 Columbia Law Review, 278; XXVI Harvard Law Review, 729; 7 American Bar Association Journal, 534, 579, 671; 26 Law Notes, 87; 19 Michigan Law Review, 497; 55 American Law Review, 428; 56 American Law Review, 221; 22 Columbia Law Review, 656; 17 Illinois Law Review, 173; 95 Central Law Journal, 240; 7 Marquette Law Review, 76; 57 American Law Review, 223; Fletcher Encyc. Corp., 1924 Sup., 727; Conyngton on Financing an Enterprise, Vol. 2, page 394; XXIV Columbia Law Review, 449; XXV Columbia Law Review, 43.

The article in XXIV Columbia Law Review 449 by Mr. Bonbright, and that in XXV Columbia Law Review 43 by Mr. Berle, deal with this question at some length, and along sound lines.

2. XXXVII Harvard Law Review, 464; 2 Conyngton on Financing an Enterprise, 394

3. Laws passed since January 1, 1925, have not been considered.

4. Chapter 608, Laws of 1920.

5. Laws of 1923, Chapter 787, approved May 24, 1923.

(a) That the capital shall be at least equal to the aggregate par value of the issued shares having par value, plus a stated sum ($1.00 or more) for each issued share without par value; or

(b) That the capital shall be at least equal to the sum of the aggregate par value of all issued shares having par value, *plus the aggregate consideration received* for shares without par value.

In either case the fixed capital may be increased by amounts added from time to time by the board. The only other important provision is that no dividend shall be declared so as to impair capital or unless the value of the assets remaining shall at least equal the value of its liabilities, including its capital. If the incorporators proceed under (a), stating the amount of authorized capital, if any share without par value is sold for a consideration exceeding its aliquot part of the stated capital, the excess may be treated as paid-in surplus available for dividends or may by the directors be added to the stated capital. If the incorporators proceed under (b), then the entire consideration received for the shares without par value must be established as fixed or stated capital not subject to impairment by payment of dividends, and there can be no paid-in surplus from such no par shares.

The present California statute[6] is similar to the present New York law. Prior to its passage, the California court held[7], in the case of a corporation with par value shares, that the entire proceeds of the sale of its shares, even though more than the par value, constituted capital not available for dividends. This decision was based on Section 309, Civil Code, which provided that no dividends shall be paid by a corporation "except from surplus profits arising from the business thereof," which was construed to limit dividends to profits arising from operations after its shares were issued, making the creation of a paid-in surplus a legal impossibility in California. This decision does not seem applicable to California corporations, organized under its present no par statutes, which elect to state the amount per share of the fixed capital, because the recent statute provides merely that no such corporation shall declare any dividend which shall reduce the amount of its stated capital.

The Illinois statute probably comes under the second class, making the entire consideration for no par shares fixed capital not available for dividends. Although it provides that the amount of the capital stock may be stated in the certificate where no par shares are provided for, and thus seems to permit that part of the consideration received in excess of the stated capital to be treated as paid-in surplus, and although it merely prohibits dividends by which "its capital is thereby impaired," it provides that "for the purposes of this section the capital of the corporation shall be considered as the aggregate amount paid in on its shares of capital stock issued and outstanding." Literally and narrowly construed, this provision seems to make a paid-in surplus a legal impossibility in Illinois. A more liberal interpretation would be that it refers to amounts paid in on capital account and not amounts in excess of the stated capital.[8]

Ohio is in the doubtful column on the question whether any part of the consideration for no par shares may be treated as paid-in surplus available for dividends. The original no par statute of the state[9] required the amount of the capital stock to be stated in the certificate, which should include a sum equivalent to $5.00 or a multiple thereof for each share of no par stock authorized. So far this seemed to leave matters so that if a share without par value were sold for a consideration in excess of its aliquot part of the stated capital, the excess might be treated as paid-in surplus. However, that act also prohibited any dividends "out of the fund received from the sale of its stock," thus apparently preventing the creation of a paid-in surplus available for dividends.[10]

The present Ohio statute[11] provides that the common capital with which such a corporation may commence business shall be stated in the certificate at $500.00 or more. No gross amount of common capital need be stated in the certificate, and there is no provision that the stated capital shall include any fixed amount per share for shares (not preferred) without par value. The dividend clause is that "no such corporation shall declare or pay any dividends except from surplus profits arising from the business," which applies to all corporations in Ohio. If given the same construction as a similar provision was given by the California court,[7] then it is legally impossible in Ohio to create a paid-in surplus available for dividends out of the consideration received by the corporation for its no par shares, and this is equally true with respect to shares having a par value where the consideration exceeds the par value.[12]

Of the statutes of the third class above mentioned, which seem to require no stated or fixed capital stock and to allow the corporation to decide for itself what portion of the consideration received for no par shares may be treated as paid-in or initial surplus available for dividends, the Delaware statute is the most familiar example. Under the Delaware act[13] relating to corporations with no par shares, the amount of capital stock is not required to be stated in the certificate but only the number of shares authorized. The amount of paid-in capital with which it will commence business is not required to be stated but only the number of shares to be issued before it commences business, which shall be not less than ten. The shares may be issued for such consideration as may be fixed from time to time by the stockholders or, if authority so to do is given in the certificate, by the directors. For tax purposes, but for no other purpose, no par share shall be taken to be of the par value of $100.00 each. The dividend provision (applicable to all corporations) is that no dividends shall be paid "except from the surplus or net profits."[14] Unless there is some general principle outside of the provisions of this statute requiring all or part of the consideration received for shares without par value to be set up as fixed capital, such

6. Chapter 293, Statutes of 1923; Sections 290 (b) and 290 (c), Civil Code.
7. Merchants & Insurance Reporting Co. v. Youtz, 178 Pac. 540.
8. See Roberts & Scheffer Co. v. Emmerson, 313 Ill. 137; People v. Emmerson, 305 Ill. 348.
9. Act. of May, 1919.
10. This last provision seems to have been overlooked by the Solicitor of Internal Revenue in applying Section 202 (b) of the Revenue Act of 1918 and Article 1567, Regulations 45, to a consolidation effected under the Ohio statute of 1919. Cumulative Bulletin No. 3, page 59. See note 22.
11. Act of May 14, 1921.
12. See, however, Western & Southern Fire Ins. Co. v. Murphy, 156 Pac. 885 (Okla.) and note 19.
13. Laws of Delaware, 1917, Chapter 113.
14. Section 4 (a), Chapter 65, Revised Code; Section 35, Chapter 65, Revised Code. See Peters v. U. S. Mortgage Co., 114 Atl. Rep. 596, discussed later in this article.

a requirement does not exist in Delaware. No such principle has been disclosed. Corporations are creatures of statute. Under the modern system by which corporations are organized under general laws, their charters are drafted by the incorporators, who may, within the limits imposed by the statutes, insert such provisions in the charter as they please. In every case where it has been held that all or part of the consideration received by a corporation for shares of stock constitutes fixed capital not available for dividends, it has been by virtue of some statutory provision, such as a requirement that the amount of capital be stated, that it be paid in, or that dividends may not be paid out of the consideration received for shares. There is no such requirement in the Delaware law. The incorporators are left free to deal with the subject and provide by corporate action what part, if any, of the consideration received for shares without par value shall be set apart as fixed capital not subject to impairment by payment of dividends. They may sell the shares for such consideration as they please. If they have the right to say what part of the consideration shall be treated as paid-in or initial surplus, they may establish one cent per share as fixed capital and the balance as paid-in surplus, and carried to its logical conclusion this means that the whole consideration may be treated as a fluid fund available for dividends. Under the Delaware law the conclusion must be either that the corporation is required to set up the whole consideration as fixed capital or that it is not required to so treat any part of it. There is no middle ground. Either it is legally impossible in that state to create a paid-in surplus out of the consideration received for no par shares or the whole may be so treated. It follows that under such a statute a corporation issuing only shares without nominal or par value may be organized without any fixed capital, and that all the contributions by the stockholders may be treated as a fund available for dividends so long as the debts are first provided for. Or, to state it differently, in determining whether there is a surplus available for dividends, "capital stock" does not appear in the liability column.[15]

The provisions in some statutes requiring a stated capital for shares without par value were no doubt inserted because without them no part of the consideration need be established as fixed capital. So far as creditors and the "trust fund" theory are involved, there is little practical difference between the present New York law, which permits as little as $1.00 per share of the consideration received for no par shares to be established as fixed capital, and a statute like that of Delaware, which does not require any. If it be conceded that a statute which requires some stated capital allows that part of the consideration in excess of the stated capital to be treated as paid-in surplus, the argument that a statute like that of Delaware, which requires *no* stated capital, makes it necessary to treat the *entire* consideration as fixed capital and prohibits a paid-in surplus, is not convincing. The Delaware statute prohibits the payment of dividends except "out of surplus *or* profits." It does not require dividends to be paid only out of profits earned in operations subsequent to the issuance of and payment for its stock.[16]

The Oklahoma court held that the term "surplus profits" (note the absence of the disjunctive "or" used in the Delaware statute), in a statute allowing a corporation to purchase its own shares out of surplus profits, included a paid-in surplus, saying "the term 'surplus profits' implying the difference over and above the capital stock, debts and liabilities, no matter how created."[17] The provision of the Delaware law requiring dividends to be paid only out of surplus of profits applies to corporations with stated capital and par value shares as well as to those with no stated capital and shares without par value. If it prohibits the creation of a paid-in surplus in one case it does so in the other.

The Massachusetts court has said,[18] in speaking of the funds derived by a corporation from selling its par value stock for more than par:

> We find nothing which would have prevented this corporation . . . from using this surplus, profit and loss, undivided profits, or however the premium may be designated, for any legitimate purpose. Not having been segregated as capital, it could be appropriated for payment of dividends.
>
> It represents a portion only of treasury assets in the nature of gains or profits, which the corporation could distribute without reducing the value of its remaining assets below the par value of its entire capital . . . or impairing its resources, which remained amply sufficient for the satisfaction of all indebtedness.

The New York court has held[19] that a surplus created by amendment to the articles reducing the amount of authorized capital was a surplus available for dividends.[20]

It has been stated that a corporation must have some capital.[21] This is true in the sense that it usually must have some property with which to do business. It does not seem to be true in the sense that a corporation must have a fixed or stated capital not available for dividends, unless the statutes under which the corporation is organized require that all or a part of the consideration received for its shares must be so set apart. Of course, without any statutory requirement, the incorporators may provide for a stated capital not available for dividents.

In a case arising under the Revenue Act of 1918,[22] the Solicitor of Internal Revenue held:

> The laws of Delaware do not require a corporation issuing no par stock to fix in a certificate or on its books

15. Some cautious lawyers operating under the Delaware statute follow the practice of organizing a corporation with stated capital and par value shares, disposing of the shares for an amount in excess of their par value and setting up the excess as paid-in surplus, and immediately afterwards amending the certificate, substituting no par shares for par value shares and expressly retaining as the fixed capital and as surplus the respective amounts originally established. See Hood Rubber Co. v. Commonwealth, 131 N. E. 201, a Massachusetts case approving that method under a similar statute.

16. Prior to 1917 the Delaware law prohibited dividends "except from surplus or net profits arising from its business." See Section 1949, Revised Code, 1915. The phrase "arising from its business" was stricken out by Chapter 112, Section 14, Laws of 1917.

17. Western & Southern Fire Ins. Co. v. Murphy, 156 Pac. 885.

18. Smith v. Cotting, 120 N. E. 177, 181.

19. Strong v. Brooklyn Crosstown R. R. Co., 93 N. Y. 426; Seeley v. New York Nat'l Exchange Bank, 8 Daly 400, affirmed 78 N. Y. 608.

20. At the time this decision was rendered in 1878, there was a statute in force in New York prohibiting dividends "except out of surplus arising from the business." Revised Statutes, New York, Banks Bros., 7th Ed., Part I, Chapter 8, Title IV, Section 9.

21. XXVI Harvard Law Review, 739.

22. Section 202 (b), Revenue Act of 1918, Article 1567, Regulations 45.

Section 202 (b), relating to consolidations, provided that on consolidations of two or more corporations through transfer of their properties to a new corporation, whose stock was issued in exchange for the stock of the old corporations, no gain was realized by the exchange unless the par value of the new stock exceeded the par value of the old. Article 1567 provided:

"So-called no par value stock issued under a statute or statutes which require the corporation to fix in a certificate or on its books of account or otherwise an amount of capital or an amount of stock issued which may not be impaired by the distribution of dividends, will, for the purpose of this section, be deemed to have a par value representing an aliquot part of such amount. . . . In the case (if any) in which no such amount of capital or issued stock is so required, no par value stock

of account or otherwise, an amount of capital or an amount of stock issued which may not be impaired by the payment of dividends.

By Article 1567, Regulations 45, the Treasury Department recognized the fact that under some statutes no part of the consideration received by a corporation for shares without par value need be established as fixed capital. This regulation also recognized that where so-called no par value shares are issued under a statute which requires that there be established out of the consideration received for the shares a fixed or stated capital not subject to impairment by payment of dividends, each share has in fact a par value in the amount of an aliquot part of the fixed capital. Such shares have an actual par value in the sense that they represent a stated amount of fixed capital as truly as shares which express it on their face, the only difference being that in the one case the par value is expressed in the certificate of stock and in the other it is not.[24] Shares which in truth have no par value are those issued under laws which do not require any stated or fixed capital and where no such capital is established by the corporation. It may be truly said that such shares are not properly speaking "shares of stock" as such a corporation has no capital stock, but they are shares in the net assets of the corporation, and, if they have voting power, in the control of the corporation.

It has been suggested that the case of Peters v. United States Mortgage Co.[25] may establish the principle that under the Delaware statutes the entire consideration paid to a corporation for no par shares constitutes a fixed capital not available for dividends.[26] It is difficult to see how such a proposition is supported by the decision. In that case a corporation, having a stated amount of capital stock divided into shares with par value, had realized from the sale of its shares less than their par value. Some profits had been realized by business operations after the shares were issued, but the amount of these profits added to the capital actually paid in, fell short of the par value of the outstanding shares. The complainant sought to enjoin payment of a dividend on the ground that no surplus was available for that purpose. The chancellor held that the amount "paid in" constituted the capital and that the statute allowing dividends "out of surplus *or* profits" allowed dividends out of "profits" even if there were no surplus. From the holding that if less than the par value is received the amount paid in constitutes the capital, it does not follow that if more than par value is received the premium constitutes capital. To give such a meaning to the opinion would result in making an initial or paid-in surplus a legal impossibility in Delaware, a conclusion which lawyers who have organized corporations under the laws of that state would hardly accept.[27]

In the absence of a statute to the contrary there is no reason to hold that subscribers to the stock of a corporation may not, by paying more for their shares than the law requires, create a surplus available for dividends. It may be doubted whether the statutory provisions that dividends may be paid "out of surplus profits arising from the business," such as are found in Ohio, Illinois and California, should be given the construction adopted by the California court,[28] making it a legal impossibility to create a paid-in surplus out of such part of the consideration paid a corporation for its shares as exceeds the amount of fixed capital required by law.[29] Unless there is some express statutory provision to the contrary, surplus available for dividends should include the amount of assets over and above debts and liabilities and the fixed capital required by law or voluntarily established by the corporation, whether that surplus arises from ordinary earnings, from sales of shares for an amount in excess of the fixed capital required by law or established voluntarily by the corporation, or from surplus donated by stockholders after the shares are issued and paid for, or by reduction of the amount of authorized capital stock, or otherwise.

The wisdom or policy of such a statute as that of Delaware is a matter outside the scope of this article, but it may be said that so far as the protection of creditors is concerned, that law will be found as effective as those of New York or other states which require but a small amount per share to be established as fixed capital.

This discussion has necessarily been limited to a few typical statutes. Enough has been said to show that lawyers organizing corporations with shares without par value, in determining how much of the proceeds from the sale of such shares must be capitalized, should examine carefully the statutory provisions on the subject. The direct or positive provisions are those which specify what must be stated in the certificate of incorporation as to the *amount* of capital, whether a gross amount or an amount per share issued, and the indirect or negative provisions, of equal importance, are those which state out of what funds dividends may be paid, and which may be so worded as to prohibit payment of dividends out of the consideration received for shares, and thus, by indirection, establish such consideration as fixed capital. Organizing under such laws as the Delaware statute, some express provision should be made in the certificate of incorporation or in other appropriate form of corporate action as to what part, if any, of the consideration for the no par shares is to be set up as fixed capital. If the organization proceedings are silent on the subject, an intention might be implied that the entire consideration is to constitute fixed capital not available for dividends.

received in exchange will be regarded, for the purpose of this section, as having in fact no par or face value."

The solicitor was dealing with a case where two Minnesota corporations, each having a stated amount of capital stock and par value shares with accumulated surplus, were consolidated by transfer of their property to a Delaware corporation with no par value common shares. The common capital and surplus of the old corporations was the consideration received by the new company for its no par value shares. No part of this consideration was established as fixed capital by the new company, but the entire common capital and surplus of the old companies was set up on the books of the new company as a fluid fund available for the payment of dividends, the only stated amount of capital stock of the new company being the amount of its preferred stock with par value. See note 10 for a ruling by the Solicitor under Ohio statutes. The importance of this provision of the Act of 1918, as applied to cases arising under it, has been diminished by the case of Weiss v. Stern, 265 U. S. 242.

23. Internal Revenue Bulletin, Vol. III, No. 31, page 1, August 4, 1924.

24. See able dissenting opinion of Justice Thompson in Roberts & Scheffer Co. v. Emmerson, 313 Ill. 137.

25. 114 Atl. 598 (a Delaware case).

26. XXXVII Harvard Law Review, 464, 475.

27. Furthermore, the reasoning of the chancellor is not convincing. The conclusion reached might have been based on the fact that under statutory provisions as construed in Dupont v. Ball, 11 Delaware Chancery, 440; Scully v. Automobile Finance Co., 11 Delaware Chancery, 359, and other cases, the agreement between the corporation and its stockholders to accept less than par was void and the deficiency was a claim against stockholders, enforcible by the corporation as well as by creditors, and was an *asset* of the corporation, the amount of which, placed in the asset column along with the amount actually paid in, would have equaled the par value of outstanding shares and established the profits which had been earned as a true surplus.

28. See note 7.

29. See notes 17, 19 and 20.

BUST OF JOHN MARSHALL PLACED IN HALL OF FAME

Interesting Ceremony at the Hall of Fame on University Heights — Chief Justice Taft Delivers Address by Radio from Washington—Hon. John W. Davis Speaks—Memorial Presented by Association of the Bar of the City of New York

The Hall of Fame: Processional

With kindling hearts again we tread
The pathway of the mighty dead,
Where meet and pass their spirits high
Who, tasting death, disdained to die.

We hail them, fathers of the free
And prophets of our destiny,
Who from their starry height control
The tides that flood a Nation's soul.

In high humility we claim
Our birthright in their hallowed fame;
With widening vision we would rise
To the horizon of their eyes.

God of our Fathers, grant that we,
Who keep their sacred memory,
Fail not when prophecy again
Shall smite and rouse the souls of men.

ELMER ELLSWORTH BROWN.

(From "Victory and Other Verse")

ON Monday, May 21, the memorial to Chief Justice John Marshall was completed by the presentation and installation of a bronze bust of the great Chief Justice, to surmount the bronze tablet which was unveiled in the Hall of Fame of New York University in 1901. Chief Justice Taft paid a brief tribute by radio and Hon. John W. Davis, former ambassador to Great Britain and former President of the American Bar Association, made the memorial address. The bust, by Herbert Adams, was presented on behalf of the Members of the Association of the Bar of the City of New York by Henry W. Taft, President of the Association, and was unveiled by W. W. Braxton, Esq., great grandson of Chief Justice Marshall. The completion of the memorial was largely due to the public-spirited efforts of Henry D. Williams, Esq., of the New York Association, who undertook to secure subscriptions for the bust and make certain other arrangements for its presentation. Following are the addresses of Chief Justice Taft and Hon. John W. Davis on this interesting occasion.

Chief Justice Taft's Remarks

Among even the truly great, men are rare whose qualities of leadership, character and intellect coincide with their opportunities and enable them to fill such a link in the progress of the World that it can be said that if they had not lived, history would have been different. Such a man was Washington. The Revolution would not have been won and our Government would not have been launched but for him. When the Constitution, which has been formed and adopted under his Presidency, and by the strength of his influence, had to be construed to supply the needs of our people and make them a nation, fortune gave us Marshall. He proved to be a man as conspicuously separated from all of his contemporaries, and as exceptionally adapted to the work, as Washington was indispensable to the struggle for independence and the consolidation of its results.

Marshall came to the head of the Court at a time when the impulse to strong nationality had waned, and when the Virginia and Kentucky resolutions and the election of Jefferson foreshadowed a reaction from a nation to a league. Had any man but Marshall, with his true vision of the future greatness of this country, with the power of his remarkable personality upon his colleagues of the Court as they were appointed by adverse executives, with the strength of his will and the courage of his clear purpose, not been where he was for the third of a century he filled his office, we can truly say that the history of our people would have been very different. From the time of his taking his seat to the time of his death, the executive power of the Government was vested in men of wonderful popular strength, of great capacity and of powerful will. With the exception of the younger Adams, they stood for a very different conception of the meaning of our fundamental law from that which Marshall gave it. Pitted against Jefferson, Monroe and Jackson for thirty-four years, without any political power, and with nothing but the judicial function, when in death he yielded to Jackson the appointment of his successor, he left to the country a legacy of constitutional construction which obtains in full measure to the present hour, and which makes the constitutional views of those great Presidents but statements of unsound and historically rejected doctrine.

In 1803, by Marbury vs. Madison, he established the Supreme Court as the effective expounder of the limitations of the Constitution and the protector of the fundamental law. In Cohens vs. Vir-

ginia, he established the subordination of State tribunals to the Supreme Court in all Federal relations. In McCullough vs. Maryland, Osborn vs. the Bank, and Brown vs. Maryland, he marked the boundary for State legislative action. In the broad sweep of that great judgment in Gibbons vs. Ogden, he put the arterial circulation of interstate commerce under the complete control of Congress and freed it from interference by the States. In every line of all his great opinions he made the nation to live. Though he had been dead a quarter of a century, the hosts who fought for the nation and maintained it between '61 and '65, seemed to be merely executing the process of his Court.

Before Marshall became Chief Justice, the office had been twice resigned by Jay, once by Ellsworth, and had been declined by Hamilton, Patrick Henry, and Cushing, all within twelve years. Since Marshall ascended the Bench, a period of a century and a quarter, there never has been a resignation or a declination of the place. By his high judicial quality, his breadth of view, his prophetic insight into the indispensable basis for our national growth and his demonstration of what was the inescapable function of the Supreme Court in the frame-work of the Constitution, he clothed the office with a dignity and power which no man could decline. A Hall of Fame without Marshall does not deserve the name. Memorandum:

I intended to make reference in this address to Marshall's argument in United States vs. Robbins, reported in the Appendix to the 5th Wheaton. The argument was made by him in the House of Representatives in 1799, in answer to Livingston and Gallatin, and is referred to and approved by the Court in an opinion of Gray in Fong Yue King vs. United States, 149 U. S. 698, 714.

Address of Hon. John W. Davis

In this Hall consecrated to the memory of those who have deserved well of their country, we place today a bust of John Marshall, fourth Chief Justice of the United States. It is erected by members of the profession in which he early rose to honorable eminence; to which he gave the major energies of his long life, and on which his life and labors have shed undying luster.

Who dares to challenge his right to a place in this gallery of the great? Were one called on to mention the foremost names in American History, the list would certainly be incorrect or incomplete if his name were not included. Alongside the sculptured presentments of Washington, Franklin, Hamilton, Jefferson, Jackson and Adams he comes to take his place among his peers. Each passing year, with its witness of the steady growth and accelerating motion of the forces of unity and nationhood that he released for action, makes it all the clearer that this is not one of the names that was born to die.

In view of the great office that he filled we rarely think of him apart from the judicial gown that drapes this figure, yet his life throughout was one of singular variety and color. Born in a frontier cabin he was in succession a soldier of the Revolution, a legislator within his State, a leader of the Bar, an envoy to France, a member of Congress, Secretary of State of the United States, and finally, for thirty-five years Chief Justice. If his claim to immortality rests upon his service in this last position, the quality of that service finds its roots, in turn, in the busy life that had preceded it. For men are what they are, and become what they become, by reason of those manifold but frequently unseen influences that mold the plastic material of which human character is made. Like trees, we are responsive to the soil in which we grow, and to the sunshine and tempest that fall upon us.

Of the stirring events through which John Marshall passed and of the personal character which emerged from them, there is little time now to speak. This monument must stand primarily to commemorate the life and services of Marshall the Judge. It was in the quiet serenity of the court room, rather than on the tented field or in the arena of forensic debate or in the chambers of diplomacy, that he fixed his lasting claim upon the gratitude of his countrymen. There it was, as has been truly said, that

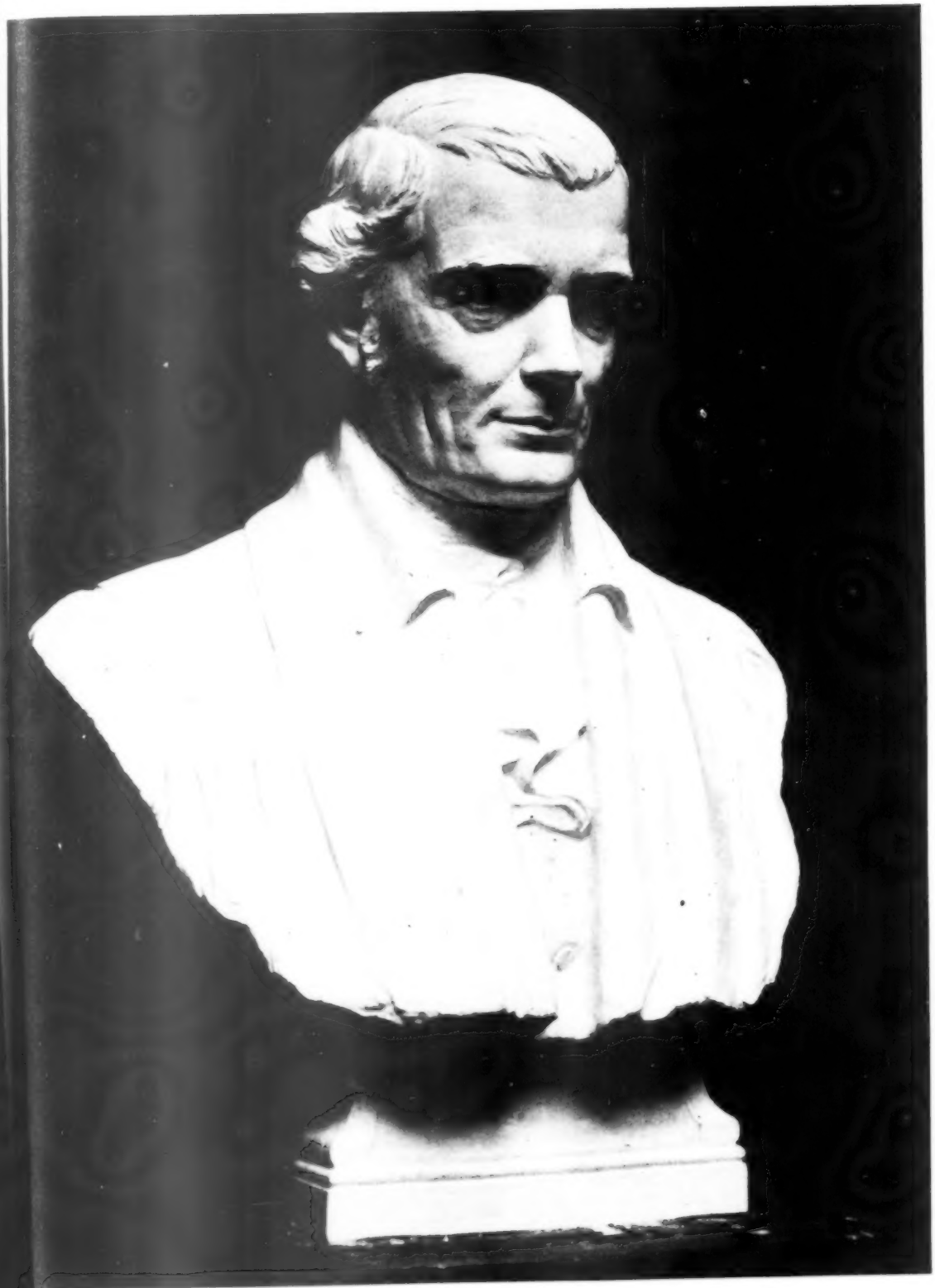
> He found the Constitution paper, and he made it power: he found it a skeleton, and he clothed it with flesh and blood.

There it was that he earned the proud soubriquet of "expounder of the Constitution," and with it a fame so fixed and constant, that although great men and great lawyers preceded and have followed him in the Chair which he adorned, by common consent of the Bench and Bar of America the words "The Chief Justice," when used without the addition of any proper name, are taken to refer to him alone.

To a reputation so resplendent and a fame so fixed we add nothing by this monument or by this ceremony. We should but deceive ourselves if we thought otherwise. Indeed, such is not the vital function of this or any similar memorial. Its true purpose is to repeat to the present and future the lessons which the past has to teach. Yet the appeal to memory is of no value unless it serves also to inspire the will. "Show me," said the orator of old "the man you honor. I know by that symptom better than by any other, what kind of a man you yourself are. Whom do you wish to resemble? Him you set upon a high column that all men looking at it may be continually apprised of the duty you expect from them."

What is the lesson that John Marshall taught his countrymen? To what duty does this monument invite us in his name? Are we not called here to learn that the men and women of these United States are one people, and their country a nation with a nation's power and a nation's responsibility; that the charter of government under which they live is not an idle parchment, but a thing of living force, adequate to protect their personal liberties at home and their peaceful rights abroad; that the road to safety and progress lies in the due observance of those restraints which it imposes upon the sovereignty of the Nation and the sovereignty of the States: and that it is only in law and the reverence for law by public officers and private citizens alike, that there can be found the source and the safeguard of all that men call freedom. And the duty to which are invited all those who may look upon this figure—and especially the young men and young women who shall come and go in the corridors of this seat of learning—is the fearless, unceasing and tireless defense of those

(Continued on page 384)



BUST OF CHIEF JUSTICE MARSHALL BY HERBERT ADAMS

guaranties of human liberty which find their expression in the Constitution of the United States.

On the same occasion there were also presented busts of William Tecumseh Sherman, Charlotte Cushman, Asa Gray and Harriet Beecher Stowe, tablets to all of whom have already been placed in the Hall of Fame. The bust of General Sherman is a replica of the one made from life by Augustus Saint-Gaudens, and was provided by subscription through the Union Society of the Civil War and the Army and Navy Club of America. The presentation was by Thomas Ewing, Esq., President of the Union Society of the Civil War. The memorial was unveiled by B. Tecumseh Sherman, Esq., son of the General. General Pershing gave a brief tribute by radio from Washington, and Major-General Charles P. Summerall, U. S. A., Commander of the Second Corps Area, also spoke. The bust of Charlotte Cushman, by Frances Grimes, was provided by popular subscription, the fund being the gift chiefly of men and women of the Stage and of admirers and relatives of Miss Cushman. It was presented by John Drew, Esq., President of The Players, and unveiled by Dr. Allerton S. Cushman, great-nephew of Miss Cushman. Otis Skinner, Esq., spoke briefly.

The bust of Asa Gray, by Chester Beach, is the gift of The Gray Herbarium of Harvard University and of friends and relatives of Dr. Gray, and was presented by Miss Katharine P. Loring, niece of Mrs. Asa Gray. Miss Alice A. Gray, niece of Dr. Gray, unveiled the bust. Dr. Charles W. Eliot, President-Emeritus of Harvard, gave a brief tribute, and Professor Benjamin L. Robinson, Curator of the Herbarium, also spoke. The bust of Harriet Beecher Stowe, by Brenda Putnam, is the gift of The New York City Colony of the National Society of New England Women, and was presented by Mrs. Arthur H. Bridge, President of the Colony. It was unveiled by Dr. Freeman Allen, grandson of Mrs. Stowe, and Rev. S. Parkes Cadman, D.D., President of the Federal Council of Churches of Christ in America, made a brief address.

The ceremonies were opened by Chancellor Elmer Ellsworth Brown of New York University. Dr. Robert Underwood Johnson, Director of The Hall of Fame, presided. There was an appropriate musical program, and the procession to the Colonnade was interesting and impressive. Readers of the JOURNAL are doubtless familiar with the magnificent gift made in 1900 for building a colonnade at New York University, on University Heights, overlooking the Palisades and the Hudson and Harlem River Valleys, with the provision that the colonnade and its substructure should be used perpetually as the Hall of Fame for Great Americans.

REVIEW OF RECENT SUPREME COURT DECISIONS

Title to Shares of Corporate Stock—Use of Subsidiary Corporation in Foreign State—Texas Statute and Tennessee Insurance Contract—Validity of Fraternal Benefit Society By-Law—Rule of Evidence Declared in California Alien Land Law Upheld—Harrison Narcotic Law Essentially Revenue Measure—New York Statute Regulating Automobile Liability Policies—National Motor Vehicle Theft Act—North Dakota Grain Grading Act

By EDGAR BRONSON TOLMAN

Conflict of Laws—Title to Corporate Stock

The question of the title to shares of corporate stock is determined by the law of the place where the certificates are located, and a transfer validly effected by such law will be recognized by the courts of the State of the corporation.

Direction der Disconto-Gesellschaft v. United States Steel Corporation et al., Adv. Ops. 235, Sup. Ct. Rep. vol. 45, p. 207.

Stock certificates, endorsed in blank, of the United States Steel Corporation, a New Jersey corporation, were purchased by two German banks and held in their London branches. Under war legislation, the British Public Trustee seized the securities and later claimed title under the Treaties. The banks brought these suits in New York to compel the Corporation to issue new certificates to them. The District Court for the Southern District of New York entered a decree dismissing the bills and declaring the Public Trustee to be entitled to the shares. Upon appeals, the decrees were affirmed.

Mr. Justice Holmes, with his characteristic terseness, delivered the opinion of the Court. He said:

> The appellants starting from the sound proposition that jurisdiction is founded upon power, overwork the argument drawn from the power of the United States over the Steel Corporation. Taking the United States in this connection to mean the total powers of the Central and the State Governments, no doubt theoretically it could draw a line of fire around its boundaries and recognize nothing concerning the corporation or any interest in it that happened outside. But it prefers to consider itself civilized and to act accordingly.

New Jersey and England both recognized endorsements in blank, he continued:

> But the question who is the owner of the paper depends upon the law of the place where the paper is. It does not depend upon the holder's having given value or taking without notice of outstanding claims but upon the things done being sufficient by the law of the place to transfer the title. An execution locally valid is as effectual as an ordinary purchase (citing case). The things done in England transferred the title to the Public Trustee by English law.
>
> If the United States had taken steps to assert its paramount power . . . a different question would have arisen that we have no occasion to deal with. The United States has taken no such steps. It therefore stands in its usual attitude of indifference when title to the certificate is lawfully obtained.

The cases were argued by Messrs. John Wild Peck and John Wilson Brown, III, for the German banks,

by Mr. William Averill Brown for the Corporation, and by Mr. Frederic R. Coudert for the Public Trustee.

Corporations,—Doing Business in the State

The use of a subsidiary corporation in a foreign State does not subject the principal corporation to suit in such State where the subsidiary is not an agent but buys the product from the parent corporation and re-sells to customers.

Cannon Manufacturing Co. v. Cudahy Packing Co., Adv. Ops. 308, Sup. Ct. Rep. vol. 45, p.

The Cannon Company brought suit in North Carolina for breach of contract against Cudahy Packing Company, a Maine corporation. The only service made was upon the process agent of Cudahy Packing Company of Alabama, a subsidiary of the Maine corporation. The defendant moved to set aside the summons and dismiss the action on the ground the defendant was not doing business in North Carolina and had not been served. The Cudahy Packing Company of Alabama was an instrumentality employed to market Cudahy products within the State. It operated not as defendant's agent, but bought its products and sold them to dealers. All its stock was owned by defendant, but separate books were kept and the forms of two entirely independent corporations were maintained. On these facts the District Court for the Western District of North Carolina concluded that the defendant was not present in North Carolina and dismissed the action. On writ of error, the Supreme Court affirmed the judgment.

Mr. Justice Brandeis delivered the opinion of the Court, and said in part:

> Congress has not provided that a corporation of one State shall be amenable to suit in the federal courts for another State in which the plaintiff resides, whenever it employs a subsidiary corporation as the instrumentality for doing business therein (citing cases). That such use of a subsidiary does not necessarily subject the parent corporation to the jurisdiction was settled by (citing cases). In the case at bar, the identity of interest may have been more complete and the exercise of control over the subsidiary more intimate than in the three cases cited, but that fact has, in the absence of an applicable statute, no legal significance. The corporate separation, though perhaps merely formal, was real. It was not pure fiction. There is here no attempt to hold the defendant liable for an act or omission of its subsidiary or to enforce as against the latter a liability of the defendant.

The case was argued by Mr. C. W. Tillett, Jr., for the Cannon Company, and Mr. J. Harry Covington for Cudahy Packing Company.

Insurance, Lex Loci

A twenty-payment life insurance policy issued in accordance with the provisions of a term policy which it replaces upon the mere application of the insured, is governed by the law of the place where the original policy was issued.

Aetna Life Insurance Co. et al v. Dunken, Adv. Ops. 137, Sup. Ct. Rep. vol. 45, p. 129.

As a condition to permission to do business in Texas, a Connecticut insurance company became bound by a Texas statute imposing twelve per cent. damages and an attorney's fee upon insurers failing to make payment after loss within thirty days after demand. The statute provided that all contracts of insurance payable in Texas should be deemed contracts entered into under the laws of that State. While living in Tennessee, Dunken took out a seven year term policy. This was convertible, at the sole option of the insured, into a twenty-payment life policy. Dunken moved to Texas, and thereafter exercised his option to convert. The application was mailed to the Tennessee manager, who sent it to the Connecticut office, and in turn received the new policy and forwarded it to Dunken in Texas. Three months later Dunken died. The company resisted payment of the policy, and judgment was rendered against the company. In error to the Texas court, the company challenged the judgment upon the ground, among others, that the policy was a Tennessee contract and, since under the laws of that State no penalty or attorney's fee was recoverable, the Texas statute as construed and applied violated the contract impairment clause, the full faith and credit clause, and Section 1 of the Fourteenth Amendment. Other minor questions were considered, but upon this constitutional point judgment was reversed by the Supreme Court.

Mr. Justice Sutherland delivered the opinion of the Court. In considering this principal contention, he reviewed relevant cases and then said:

> The contract contained in the original policy was a Tennessee contract. The law of Tennessee entered into it and became a part of it. The Texas statute was incapable of being constitutionally applied to it since the effect of such application would be to regulate business outside the State of Texas and control contracts made by citizens of other States in disregard of their laws under which penalties and attorney's fees are not recoverable (citing cases). The second policy here was issued in pursuance of, and was dependent for its existence upon, the express provisions of the contract contained in the first one. By those provisions, upon the simple application of the insured, the new policy must issue. Nothing was left to future agreement. The terms of the new policy were fixed when the original policy was made. In effect, it is as though the first policy had provided that upon demand of the insured and payment of the stipulated increase in premiums that policy should, automatically, become a twenty payment life commercial policy. It was issued not as the result of any new negotiation or agreement but in discharge of preexisting obligations. It merely fulfilled promises then outstanding; and did not arise from new or additional promises. The result in legal contemplation was not a novation but the consummation of an alternative specifically accorded by, and enforceable in virtue of, the original contract. . . .
>
> From these premises it necessarily results that the second policy follows the status of the first for which it was exchanged, and is not subject to the Texas statute relating to penalties and attorney's fees but is controlled by Tennessee law. The judgment below, therefore, in so far as it gives effect to the Texas statute by imposing a penalty of twelve per cent and allowing attorney's fees, is erroneous, in that the Texas statute cannot constitutionally be applied to a Tennessee contract.

The case was argued by Mr. W. J. Moroney for the company, and by Messrs. C. A. Boynton, W. E. Spell, and J. A. Stanford for the beneficiary.

Insurance,—Conflict of Laws

The validity of a by-law of a fraternal benefit society is determined by the law of the State of incorporation, and a member who joined in another State is nevertheless bound by the by-law where the courts of the State of incorporation have declared it valid.

Modern Woodmen of America v. Mixer, Adv. Ops. 506, Sup. Ct. Rep. vol. 45, p. 389.

Suit was brought in Nebraska by the beneficiary of a certificate issued by a fraternal beneficiary society incorporated in Illinois. By virtue of a certain by-law the society offered a defense to the suit. The Supreme Court of Illinois had held the by-law valid and binding upon members of the corporation although they had become members before the by-law was adopted. But the Supreme Court of Nebraska held the by-law unreasonable and affirmed a judgment for the plaintiff.

On certiorari, the Supreme Court of the United States reversed the judgment.

Mr. Justice Holmes delivered the opinion of the Court. He said:

> The indivisible unity between the members of a corporation of this kind in respect of the fund from which their rights are to be enforced and the consequence that their rights must be determined by a single law, is elaborated in *Supreme Council of the Royal Arcanum v. Green*, 237 U. S. 531, (542). The act of becoming a member is something more than a contract, it is entering into a complex and abiding relation, and as marriage looks to domicile, membership looks to and must be governed by the law of the State granting the incorporation. We need not consider what other States may refuse to do, but we deem it established that they cannot attach to membership, rights against the Company that are refused by the law of the domicil. It does not matter that the member joined in another State. . . .

The case was argued by Mr. Nelson C. Pratt for the corporation and by Messrs. J. J. McCarthy and George W. Leamer for the beneficiary.

Statutes,—Alien Land Law of California

The rule of evidence declared in the California Alien Land Law whereby the payment of the purchase price of land by an ineligible alien and the taking of the property in the name of another constitute a prima facie presumption of intent to evade the Act, contravenes neither the due process clause, the equal protection clause, nor the Treaty with Japan.

Cockrill et al. v. People of the State of California, Adv. Ops. 571, Sup. Ct. Rep. vol. 45, p.

Section 9 of the Alien Land Law of Japan, the essential provisions of which have heretofore been held constitutional, provides for escheat to the State of lands conveyed with intent to avoid the provisions of the Act prohibiting ineligible aliens from holding real estate. It further provides that a prime facie presumption that the conveyance was made with such intent shall arise upon proof that an ineligible alien paid for the land and that title was taken by another. Cockrill took title to land paid for by a Japanese and was convicted of violating the Act. On writ of error he contended the rule of evidence asserted against him was invalid, but the Supreme Court affirmed the judgment.

Mr. Justice Butler delivered the opinion of the Court. With regard to the due process clause he said:

> The inference that payment of the purchase price by one from whom the privilege of acquisition is withheld and the taking of the land in the name of one of another class are for the purpose of getting the control of the land for the ineligible alien is not fanciful, arbitrary or unreasonable. There is a rational connection between the facts and the intent authorized to be inferred from them.

With regard to the equal protection clause he said:

> The statute is not repugnant to the equal protection clause. The rule of evidence applies equally and without discrimination to all persons—to citizens and eligible aliens as well as to the ineligible. In the application of the law at the trial, no distinction was made between the citizen and the Japanese. Plaintiffs in error maintain that invalidity results from the fact that, where payment of the purchase price is made by an ineligible alien, the law creates a presumption of a purpose to prevent, evade or avoid escheat, while no such presumption arises where such payment is made by a citizen or eligible alien. But there are reasonable grounds for the distinction. Conveyances to ineligible Japanese are void as to the State and the lands conveyed escheat. Payment by such aliens for agricultural lands taken in the names of persons not of that class reasonably may be given a significance as evidence of intent to avoid escheat not attributable to like acts of persons who have the privilege of owning such lands. The equal protection clause does not require absolute uniformity, or prohibit every distinction in the laws of the State between ineligible aliens and other persons within its jurisdiction.

Finally, he held that the Treaty with Japan furnished no protection to Japanese subjects against the application of a rule of evidence created by state enactment that is not given them by the due process and equal protection clauses of the Fourteenth Amendment.

The case was argued by Mr. Algernon Crofton for Cockrill, and Mr. F. L. Guerena for the state authorities.

Statutes,—Harrison Narcotic Law

The Harrison Narcotic Law is essentially a revenue measure; under it a physician cannot be prosecuted for selling to an addict for self-administration four small doses to relieve conditions incident to addiction.

Linder v. United States, Adv. Ops. 489, Sup. Ct. Rep. vol. 45, p. 446.

It is a recurring question just how far the Federal Government may go under the guise of its revenue power in effecting a regulation in the interests of public welfare and morality. In the present case petitioner had been convicted of violating Section 2 of the Harrison Narcotic Law, which makes it a crime for one to dispense narcotics save on forms issued for the purpose by the Commissioner of Internal Revenue, but excepts narcotics distributed by a registered physician "in the course of his professional practice only." Petitioner was a registered physician. He had, without a written order, delivered to a patient, whom he knew to be an addict, one tablet of morphine and three of cocaine. He gave them to her not in the course of treatment of any disease, but simply to satisfy her needs for the time being. The trial court held this amounted to a violation of the Act, and the conviction was affirmed by the Circuit Court of Appeals for the Ninth Circuit. On certiorari, the Supreme Court reversed the judgment.

Mr. Justice McReynolds delivered the opinion of the Court. After stating the facts, he said:

> The declared object of the Narcotic Law is to provide revenue, and this court has held that whatever additional moral end it may have in view must "be reached through only a revenue measure and within the limits of a revenue measure" (citing case). Congress cannot, under the pretext of executing delegated power, pass laws for the accomplishment of objects not entrusted to the Federal Government. . . . In the light of these principles and not forgetting the familiar rule that "a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score," the provisions of this statute must be interpreted and applied.
>
> Obviously, direct control of medical practice in the States is beyond the power of the Federal Government. . . .

The case upon which the United States relied was that of *United States v. Behrman*, 258 U. S. 280. In that case the Supreme Court had sustained the conviction of a registered physician who had dispensed to a known addict heroin, morphine and cocaine amounting to three thousand doses. With regard to this case, the learned Justice said:

> This opinion related to definitely alleged facts and must be so understood. The enormous quantity of drugs ordered, considered in connection with the recipient's character, without explanation, seemed enough to show prohibited sales and to exclude the idea of *bona fide* professional action in the ordinary course. The opinion cannot be accepted as authority for holding that a physician, who acts *bona fide* and according to fair medical standards, may never give an addict moderate amounts of drugs for self-administration in order to relieve conditions incident to addiction. Enforcement of the tax demands no such drastic rule, and if the Act had such scope

it would certainly encounter grave constitutional difficulties.

The Narcotic Law is essentially a revenue measure and its provisions must be reasonably applied with the primary view of enforcing the special tax. We find no facts alleged in the indictment sufficient to show that petitioner had done anything falling within definite inhibitions or sufficient materially to imperil orderly collection of revenue from sales. Federal power is delegated, and its prescribed limits must not be transcended even though the end seems desirable. The unfortunate condition of the recipient certainly created no reasonable probability that she would sell or otherwise dispose of the few tablets entrusted to her; and we cannot say that by so dispensing them the doctor necessarily transcended the limits of that professional conduct with which Congress never intended to interfere.

The case was argued by Mr. George Turner for petitioner, and by Solicitor General Beck, Assistant Attorney General William J. Donovan and Mr. Harry S. Ridgley for the United States.

Statutes,—Insurance

A statute requiring policies insuring against liability for injury by operation of an automobile to contain a clause subrogating the injured person to the rights of the insured in case the latter becomes bankrupt, does not deny due process or effect an unlawful preference under the Bankruptcy Act.

Merchants Mutual Automobile Liability Insurance Co. v. Smart, Adv. Ops. 367, Sup. Ct. Rep. vol. 45, p.

In 1918 the State of New York enacted a law requiring policies insuring against liability for injury by operation of an automobile to contain a provision to the following purpose: That the insolvency or bankruptcy of the person insured should not release the insurance carrier from the payment of damages for injury, and that in case execution against the insured should be returned unsatisfied because of insolvency, an action might be maintained by the injured person or his representative against the insuring corporation under the terms of the policy. Smart was injured by Coron's automobile, Coron was insolvent and Smart's execution was returned unsatisfied, and Smart brought suit against the company by virtue of this clause. The state court gave judgment for plaintiff. On writ of error before the Supreme Court the company contended that the New York Act was invalid because it deprived the insurance company of its property without due process of law, and because it conflicted with the bankruptcy laws of the United States. Judgment was affirmed.

The CHIEF JUSTICE delivered the opinion of the Court. After recalling that the power of the State to regulate insurance companies had been firmly established, he said:

> Such regulation would seem to be peculiarly applicable to that form of insurance which has come into very wide use of late years, that of indemnifying the owners of vehicles against losses due to the negligence of themselves or their servants in their operation and use. The agencies for the promotion of comfort and speed in the streets are so many and present such possibility of accident and injury to members of the public that the owners have recourse to insurance to relieve them from the risk of heavy recoveries they run in entrusting these more or less dangerous instruments to the care of their agents. Having in mind the sense of immunity of the owner protected by the insurance and the possible danger of a less degree of care due to that immunity, it would seem to be a reasonable provision by the State in the interest of the public, whose lives and limbs are exposed, to require that the owner in the contract indemnifying him against any recovery from him should stipulate with the insurance company that the indemnity by which he saves himself should certainly inure to the benefit of the person who thereafter is injured. Section 109 does not go quite so far. It provides that the subrogation shall take place only when the insured proves insolvent or bankrupt, and leaves the injured person to pursue his judgment against the insured if solvent without reliance on the policy.

In rejecting the contention that the clause made provision for an unlawful preference under the National Bankruptcy Act, in cases where the owner who is indemnified is a bankrupt at the time of the injury, he said:

> It would not be an unlawful preference any more than security given for any lawful claim against the insured while solvent would be unlawful in the event of subsequent bankruptcy. The clause we have before us secures to the injured person the indemnity which his insurer has provided for himself in advance to avoid payment for the injury. But the clause becomes operative only in the event of the insolvency or bankruptcy of the assured when he can no longer use the indemnity to pay the injured person as he should. The title to the indemnity passes out of the bankrupt or insolvent person and vests in him whom the contract and the state law declare it should vest. The assured is divested by the terms of the instrument under which the interest of the assured and the interest of the injured then contingent, and now absolute, were created. The general creditors have lost nothing because by the fact of bankruptcy the interest of the assured in the policy passed to the injured person and did not become assets of the assured. The provision for the divesting of the interest on bankruptcy was not made to defraud creditors or in expectation of bankruptcy, but was made so far as we can know when the assured was solvent and merely to provide against a future contingency.

The case was argued by Mr. Anthony J. Ernest for the company and by Mr. John P. Bramhall for Smart.

Statutes,—National Motor Vehicle Theft Act

Congress may constitutionally make it a crime to transport, receive, conceal, store, barter, sell or dispose of, in interstate commerce, a motor vehicle which is known to have been stolen.

Brooks v. United States, Adv. Ops. 398, Sup. Ct. Rep. vol. 45, p.

Congress has exercised the police power for the public welfare, within the field of interstate commerce, by prohibiting interstate shipment of diseased stock, lottery tickets, adulterated goods, intoxicating liquors, prize fight films, and women for immoral purposes. Nevertheless, in this case it was contended that Congress could not make it a crime for one to transport in interstate commerce a motor vehicle knowing it to have been stolen. Brooks was convicted of violating the National Motor Vehicle Theft Act, approved October 17, 1919. Section 3 punishes the transportation in interstate commerce of a motor vehicle by one who knows it to have been stolen. Section 4 punishes one who receives, conceals, stores, barters, sells or disposes of a motor vehicle which is a part of interstate commerce, knowing it to have been stolen. The Supreme Court, in affirming the judgment of the District Court for South Dakota, sustained the conviction.

The CHIEF JUSTICE delivered the opinion of the Court. After reviewing the earlier decisions with regard to the exercise of power over interstate commerce for the benefit of the public, he considered *Hammer v. Dagenhart,* 247 U. S. 251, wherein it was held that Congress could not forbid the interstate transportation of articles manufactured by child labor. He then said:

> In referring to the cases already cited, upon which the argument for the validity of the Child Labor Act was based, this Court pointed out that in each of them the use of interstate commerce had contributed to the accomplishment of harmful results to people of other States, and that the Congressional power over interstate transportation in such cases could only be effectively exercised by pro-

hibiting it. The clear distinction between authorities first cited and the *Child Labor* case leaves no doubt where the right lies in this case. It is known of all men that the radical change in transportation of persons and goods effected by the introduction of the automobile, the speed with which it moves, and the ease with which evilminded persons can avoid capture have greatly encouraged and increased crimes. One of the crimes which have been encouraged is the theft of the automobiles themselves and their immediate transportation to places remote from homes of the owners. Elaborately organized conspiracies for the theft of automobiles and the spiriting them away into some other State and their sale or other disposition far away from the owner and his neighborhood have roused Congress to devise some method for defeating the success of these widely spread schemes of larceny. The quick passage of the machines into another State helps to conceal the trail of the thieves, gets the stolen property into another police jurisdiction and facilitates the finding of a safer place in which to dispose of the booty at a good price. This is a gross misuse of interstate commerce. Congress may properly punish such interstate transportation by any one with knowledge of the theft because of its harmful result and its defeat of the property rights of those whose machines against their will are taken into other jurisdictions.

He held the fourth section valid as merely making more effective the regulation contained in the third section.

The opinion also disposes of certain minor questions not constitutional in their nature.

The case was argued by Mr. Joe Kirby for Brooks, and by Assistant Attorney General William J. Donovan for the Government.

Statutes,—The North Dakota Grain Grading Act

The North Dakota Grain Grading Act by its necessary operation directly interferes with and burdens interstate commerce and is therefore invalid.

Shafer et al. v. Farmers Grain Company of Embden et al., Adv. Ops. 554, Sup. Ct. Rep. vol. 45, p. 481.

In affirming a decree of the District Court for North Dakota which had enjoined the enforcement of the North Dakota Grain Grading Act, the Supreme Court in this decision holds that Act unconstitutional. It will be remembered that in *Lemke v. Farmers Grain Company*, 258 U. S. 50, an earlier statute with the same purpose was declared invalid. The present decision, however, does not rest upon the authority of the earlier case, but proceeds from an independent consideration of the present facts.

The new statute, an initiated measure approved in November, 1922, regulated the marketing of and established a system of grading for farm products. Wheat is the chief produce of North Dakota; most of its sale is an interstate commerce. The established commercial practice is for the farmers to haul their grain to county elevators and there sell it by grade to buyers for shipment out of the State. Among the statutory provisions regulatory of this practice were the following: The Act required all buyers by grade to secure state licenses upon satisfactory examination. The license was made revocable for incomplete or fraudulent weighing or grading. The Act prevented the usual practice of selling without separating "dockage" (i. e., separable foreign material) by requiring the buyer to separate the dockage and return it to the producer, or else distinctly value and pay for it. It required operators of elevators to obtain a yearly license, to file a bond with the State for all wheat bought on credit, and to keep certain records subject to state inspection.

Mr. Justice Van Devanter delivered the opinion of the Court. After a full statement of the facts, he said:

> The decisions of this Court respecting the validity of state laws challenged under the commerce clause have established many rules covering various situations. Two of these rules are specially invoked here—one that a state statute enacted for admissible state purposes and which affects interstate commerce only incidentally and remotely is not a prohibited state regulation in the sense of that clause; and the other that a state statute which by its necessary operation directly interferes with or burdens such commerce is a prohibited regulation and invalid, regardless of the purpose with which it was enacted. These rules, although readily understood and entirely consistent, are occasionally difficult of application, as where a state statute closely approaches the line which separates one rule from the other. As might be expected, the decisions dealing with such exceptional situations have not been in full accord. Otherwise the course of adjudication has been consistent and uniform.
>
> In our opinion the North Dakota Act falls certainly within the second of the two rules just stated. By it that State attempts to exercise a large measure of control over all wheat buying within her limits. About 90 per cent. of the buying is in interstate commerce. Through this buying and the shipping in connection with which it is conducted the wheat which North Dakota produces in excess of local needs—more than 125,000,000 bushels a year—finds a market and is made available for consumption in other States where the local needs greatly exceed the production. Obviously therefore the control of this buying is of concern to the people of other States as well as to those of North Dakota.

After inquiring into the nature and degree of regulation here imposed, he said:

> We think it plain that, in subjecting the buying for interstate shipment to the conditions and measure of control just shown, the Act directly interferes with and burdens interstate commerce, and is an attempt by the State to prescribe rules under which an important part of such commerce shall be conducted. This no State can do consistently with the commerce clause.

He said further:

> The defendants make the contention that we should assume the existence of evils justifying the people of the State in adopting the Act. The answer is that there can be no justification for the exercise of a power that is not possessed. If the evils suggested are real, the power of correction does not rest with North Dakota but with Congress, where the Constitution intends that it shall be exercised with impartial regard for the interests of the people of all the States that are affected.

The learned Justice rejected the contention that because the Act adopted for the State whatever grades or measures should be adopted under the United States Grain Standards Act, the Act was no more than an attempt to assist in carrying out the purposes of the Federal statute. The provisions for separation of dockage, grading licenses, filing of bonds, and keeping of records, had no example in the Federal Act and made the state Act an additional and direct regulation of interstate commerce.

Mr. Justice Brandeis dissented.

The case was argued by Mr. Seth W. Richardson for the state authorities, and by Mr. David F. Simpson for the wheat buyers.

Financing Education

The Educational Finance Inquiry Commission of the American Council on Education, having concluded that the most promising way of studying the problem of financing education in general would be by intensively studying conditions in a few states, has just completed the final pamphlet of the Illinois series, the *Public School Debt in Illinois*, by George W. Willett (Macmillan, $1.00). This, as well as those previously published are summarized and interpreted in a separate short volume, also now available, the *Financing of Public Schools in Illinois* by Henry C. Morrison (Macmillan, $1.00). Other states considered or to be considered in the same manner are New York, California, and Iowa.

PADLOCK INJUNCTIONS

Express Provisions of National Prohibition Act Make Sale or Manufacture of Liquor an Offense but Certain Sections Plainly Attempt to Substitute an Equitable Procedure for the Usual Criminal One—Inquiry as to Constitutionality—Limits of Equitable Jurisdiction

By James Monroe Olmstead
Of the Boston, Massachusetts, Bar

INASMUCH as the Supreme Court has recently decided that one section of the National Prohibition Act, c. 85, sec. 35, 41 Stat. 305, is unconstitutional, it may be of importance to examine whether other sections are not equally unconstitutional for the same or similar reasons.

Lipke v. Lederer, 259 U. S. 557, 559, 561, 562, was an attempt to collect a revenue tax under sec. 35. While this section seeks to preserve the tax, the court holds that the word "tax" amounts to a penalty. The court speaks of the Act as follows:

"The mere use of the word tax in an act primarily designed to define and suppress crime is not enough to show that within the true intendment of the term a tax was laid"; and again, "Sec. 35 of the Prohibition Act confers no such power as the collector seeks to exercise; and he is undertaking to punish complainant by fine and penalty for an alleged criminal offense without hearing, information, indictment or trial by jury, contrary to the Federal Constitution. If the latter section has the meaning ascribed to it by the defendant, it is unconstitutional"; and again, "Appellant maintains that the demand upon him was not for taxes; but for a penalty for an alleged criminal act; that the method adopted for enforcing this penalty is contrary to the Federal Constitution; and that if construed as appellee insists it should be, sec. 35 is unconstitutional"; and again, "And certainly we cannot conclude, in the absence of language admitting of no other construction, that Congress intended that penalties for crime should be enforced through the secret findings and summary action of executive officers. The guarantees of due process of law and trial by jury are not to be forgotten or disregarded. See Fontenot v. Accardo (C. C. A.) 278 Fed. 871. At p. 873, the Circuit Court of Appeals says, 'The act of Congress, passed to enforce the Eighteenth Amendment, is a highly penal statute. It is not a revenue measure.'"

The decision in the case of Lipke v. Lederer was closely followed in that of Regal Drug Corporation v. Wardell, 260 U. S. 386, 387. The court says, "The case involves the legality of taxes, assessments or penalties under the revenue law of the National Prohibition Act, upon certain distilled spirits and liquors of the Regal Drug Corporation, and the distraint of its store and the property contained therein." Referring to Lipke v. Lederer, the court says, "We took pains to say that 'evidence of crime' (Sec. 29) is essential to assessment under sec. 35," and affirmed the conclusion as arrived at in Lipke v. Lederer, that the act was unconstitutional, as punishing the defendant without hearing and trial by jury.

Reverting now to a construction of Secs. 21, 22, 23, 24 and 29 of Title II; shortly stated sec. 29 makes the manufacture or sale of liquor an offense and crime punishable by certain penalties. Sec. 21 provides that certain buildings, etc., are declared to be a common nuisance. Briefly stated secs. 22 and 23 attempt to provide an equitable procedure to enjoin this nuisance, and enact that any buildings, etc., may be abated and by order of court closed "for one year," and the owner of the premises is made a co-defendant and particeps criminis with the lessee, and his property forfeited. Sec. 24 supplies a procedure in contempt proceedings, but for the usual discretion of the chancellor, a specific fine or imprisonment is imposed.

It cannot, therefore, be maintained that the sale or manufacture of liquor is not made an offense by the express provisions of this Act. The attempt, however, is apparent to substitute for the usual criminal procedure an equitable one. The inquiry therefore is, Is this constitutional?

Article III, sec. 2, of the Constitution of the United States provides: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . ." Article VI of the Amendments provides "In all criminal prosecutions, the accused shall enjoy the right of a speedy and public trial, by an impartial jury . . ." Article VII of the Amendments provides "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . ." Briefly stated Article XII of the Massachusetts Declaration of Rights provides for the trial of crimes by a jury.

About the time when the States were inventing and enacting this novel species of Padlock legislation, an act was passed in Massachusetts similar to the provisions of sec. 22 of the present Prohibition Act. This Act of 1887, c. 380, was challenged as to its constitutionality in the case of Carleton v. Rugg, 149 Mass. 550, 558. The court, consisting of seven judges, by a bare majority, decided that a court of equity had a right to abate a liquor nuisance and did not discriminate as the dissenting opinion did as to different kinds of public or common nuisances. A vigorous and able dissenting opinion was rendered by Mr. Justice Field, who held that the Act was unconstitutional, as violative of Article XII of the Declaration of Rights.

His opinion was concurred in by Mr. Justice William Allen and Mr. Justice Devens, the latter of whom had been an Attorney General of the United States.

A word as to Mr. Justice Walbridge A. Field may not be out of place in this connection. He had been an Assistant Attorney General of the United States, a member of Congress, and was subsequently Chief Justice of the Massachusetts Supreme Court. It was reported that Rufus Choate and he were the only two graduates of Dartmouth College who ever took a perfect mark, and it is pretty generally considered that

his was one of the brightest legal minds that the country ever knew.

In his dissenting opinion, he says, "Indeed, there are many indications that the principal reason why the statute was passed was to avoid a trial by jury."

In referring to the jurisdiction of courts of equity to enjoin public nuisances, the dissenting opinion of Mr. Justice Field is in part as follows:

"In Missouri v. Uhrig, 14 Mo. App. 413, this jurisdiction was examined, and the court says that it had been exercised only in three classes of cases: first, 'to restrain purprestures of public highways or navigations'; secondly, 'to restrain threatened nuisances dangerous to the health of a whole community'; thirdly, 'to restrain *ultra vires* acts of corporations injurious to public right'; and that 'the exercise of equity jurisdiction in these three classes of cases is an exception to a very general, well understood, and important rule, . . . that a court of equity has no jurisdiction in matters of crime.'

"In Attorney General v. Tudor Ice Co., 104 Mass. 239, this court says, that sitting in equity it 'does not administer punishment or enforce forfeitures for transgressions of law; but its jurisdiction is limited to the protection of civil rights, and to cases in which full and adequate relief cannot be had on the common law side of this court or of the other courts of the Commonwealth.' The court also says that 'the only cases in which informations in equity in the names of the Attorney General have been sustained by this court are of two classes. The one is of public nuisances, which affect or endanger the public safety or convenience, and require immediate judicial interposition, like obstructions of highways or navigable waters . . . The other is of trusts for charitable purposes,' etc. See Attorney General v. Jamaica Pond Aqueduct, 133 Mass. 361; Attorney General v. Consumers' Gas Co., 142 Mass. 417. No case has been cited where, under the general jurisdiction of a court of equity, an injunction has been granted in behalf of the public to restrain a person from selling intoxicating liquors, or from keeping them for sale in violation of statutes, or from doing similar acts which have been prohibited on general considerations of public policy. So far as appears, courts acting under their general equity powers have refused to entertain suits brought for this purpose. Missouri v. Uhrig, 14 Mo. App. 413. State v. Crawford, 28 Kans. 726.

"The Massachusetts Statute of 1887, c. 380, was not passed for the abatement of a nuisance by destroying or changing the character or condition of tangible property, or by removing obstructions to the exercise of a public right. Its purpose was, I think, to prevent the illegal sale of intoxicating liquors by punishing by fine or imprisonment, or by both, without limit, in the discretion of the court, any person who sells or keeps such liquors for sale after he has been enjoined by the court. The prevention of crime by the punishment of persons found guilty of an offense against a general law is the end aimed at. The keeping or selling of intoxicating liquors without a license was a well known offense when our Constitution was adopted, and the procedure for punishing it, or for forfeiting the liquors, was also well known. Articles XII and XV were inserted in the Declaration of Rights as a protection to every individual in his life, liberty, and property. If a statute had given jurisdiction in equity to hear without a jury an information like this, and had authorized the court, on finding the respondent guilty, to punish him in its discretion, without limit, by fine, or imprisonment, or both, in what substantial respect would such a statute differ from this? The Legislature cannot do indirectly what it cannot do directly; it cannot change the nature of things by affixing to them new names. If the Legislature, by statute, can authorize a court in a public prosecution to enjoin any person from illegally keeping or selling intoxicating liquors in any specified place within the Commonwealth, why cannot it authorize a court to enjoin any person from illegally keeping or selling intoxicating liquors anywhere within the Commonwealth? and, if this can be done, why can it not authorize a court at the suit of the Commonwealth to enjoin any person from doing any illegal or criminal act anywhere within the Commonwealth, and to try without a jury any person so enjoined, on a charge of having violated the injunction, and to punish him by fine and imprisonment, without limit, if the court find him guilty?

"Except for constitutional limitations, the Legislature could deal with all crimes by way of injunctions in equity. Indeed, if this jurisdiction were confined to crimes having some direct relation to a particular building, place, or tenement, the number of such crimes is large, and all crimes have some relation to place, as they must be committed somewhere. The harboring or concealing of criminals; the receiving or concealing of stolen or embezzled property; the making or keeping of instruments intended for criminal use; the violation of the provisions of criminal statutes regulating trade; burglary, arson, and other similar offenses—have a direct relation to a particular building, place, or tenement, and the building, place, or tenement in which these offenses are committed may be said to be used for the purpose. In the prosecution of crimes by way of injunctions in equity, the existing statute of limitations would not be a defence, and the whole course of criminal procedure would be changed. It was not the intention of the Constitution that persons should be punished for violating general laws by proceedings in equity, or by a court acting without a jury, and subject to no limitations upon its power to fine and imprison except its own discretion. The safeguards of the common law were carefully secured by the Declaration of Rights, both in public prosecutions and in private suits, 'except in cases in which it has heretofore been otherways used and practiced.' This is not such a case, and the only thing novel about it is the procedure. Statutes against illegally selling or keeping for sale intoxicating liquors, from the earliest times, have been enforced by criminal complaints or indictments, or by penal actions. Such statutes were never enforced in equity anywhere when the Constitution was adopted. I think that the statute under which the present proceedings were brought is inconsistent with Article XII of the Declaration of Rights."

In the recent case of Hedden v. Hand (1919), 90 N. J. Eq. 583, 596, 597, the right to invoke chancery to enforce a criminal statute was denied. The New Jersey Statute declared buildings where prostitution and habitual sales of intoxicating liquor occur to be nuisances. The court says, "Keeping in view that the maintenance of disorderly houses was a crime at common law and was punishable and abatable in the courts of criminal jurisdiction only, it is clear that the effect of making such a crime punishable and abatable in the court of chancery is to deprive a defendant of his constitutional right to have an indictment preferred against him by a grand jury of the county in which such nuisance is alleged to exist, and a trial by jury. . . . It is idle to entertain the thought for a single moment

that the legislature can change the nature of an offense by changing the forum in which it is to be tried. . . . In conclusion, it may be mentioned that the authority attempted to be conferred by the legislature on the court of chancery to abate a public nuisance of the character specified in the statute can be more effectually exercised by the inherent power possessed by the criminal courts as established in this state."

The case of Keeter v. State of Oklahoma, 82 Okla. 89, 93, was one involving the forfeiture of an automobile. The statute provided for equity jurisdiction expressly without a jury. The court held that the act violated the Seventh Amendment and State Constitution and draws the distinction which Mr. Justice Field, in Carleton v. Rugg, citing the case of Missouri v. Uhrig, 14 Mo. App. 413, makes as to the three classes only where equity may abate a public nuisance. The court, making a distinction between such nuisances per se as decayed fruits, fish, unwholesome meats, infected clothing, obscene books, pictures and gambling paraphernalia, and horses, mules, wagons and automobiles which are property ordinarily used for lawful purposes, says, "If the Constitution fails to protect a citizen from being deprived of such property as wagons, buggies, horses, and automobiles without the right of a trial by jury, where the only issue involved is whether the owner of such property is a criminal and has committed a criminal offense in the unlawful use of his property, then we know of no case that falls fairly within the meaning of the provisions of the Constitution under consideration. We would be confronted with the unreasonable situation that a deputy sheriff could file an accusation against any farmer in this state, charging him with having transported whisky in his wagon; the farmer could come into court, being a man whose reputation had never been challenged, and deny the accusation and demand that the issues joined be submitted to a jury before his team be declared forfeited, but under Sec. 2 of the act of 1917, supra, the right of trial by jury must be denied. We cannot adhere to any such construction of the Constitution of this state."

As regards forfeitures, in Marshall v. Vicksburg, 15 Wall, 146, 149, the court says, "Equity never, under any circumstances, lends its aid to enforce a forfeiture or penalty or anything in the nature of either."

In re Sawyer, 124 U. S. 200, 210, Mr. Justice Gray says, "The office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to protection of rights of property. It has no jurisdiction over the prosecution, the punishment or the pardon of crimes or misdemeanors, or over the appointment and removal of public officers. To assume such a jurisdiction or to sustain a bill in equity to restrain relief against proceedings for the punishment of offenses, or for the removal of public officers, is to invade the dominion of the present common law, or of the executive and administrative departments of the government."

In Boyd v. United States, 116 U. S. 616, 634, Mr. Justice Bradley says, "proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal."

Garnharts v. United States, 16 Wall 162, 165, holds, "Where the seizure is made on land the claimant is entitled to a trial by jury."

Dobbins' Distillery v. United States, 96 U. S. 395, 399-401, a procedure to forfeit a distillery for violation of the revenue laws, was tried by a jury, and the guilt of the lessee was imputed to the owner, who was thus made particeps criminis, and this is true where the offense is malum prohibitum or malum in se.

Goldsmith-Grant Co. v. United States (1921), 254 U. S. 505, 508, where an automobile as a guilty thing, or deodand, was forfeited, was tried by a jury. The same right of trial by jury in case of forfeitures, was asserted in Shawnee Nat. Bank v. United States (C. C. A.), 249 Fed. 583. What clearer case of forfeiture of premises can be presented than that contained in sec. 22, where the owner or landlord is made particeps criminis with the tenant and deprived of his property for a year by summary process in equity and without finding of fact by a jury?

The decisions also hold that there is adequate remedy at law in the order of abatement which may be issued as part of the sentence in a criminal action. The remedy at law by indictment and criminal abatement is adequate. Taggart v. Com. (1853), 21 Pa. 517; King v. Stead (1799), 8 T. R. 142, 144. In State v. Morris & Essex R. R. Co., 23 N. J. Law 360, 370, Chief Justice Green said, "The principal object of an indictment for a nuisance is to compel it to be abated; and regularly a part of the judgment upon conviction is, that the nuisance be abated." 1 Chit. Crim. L. 716; King v. Stead, 8 D. & E. 142.

Turning now to Federal decisions under the present act, in the case of United States v. Cohen, 268 Fed. 420, 424 (October, 1920), Judge Faris, in the District Court of Missouri, referring to the adequacy of the remedy at law and unconstitutionality, says:

"The bill before me does not aver that defendant has ever been either prosecuted, or convicted, for making illegal sales of liquor at the premises named in the bill, or at any other place or premises. Neither does it aver, or sufficiently aver, facts meet to constitute a nuisance at common law. It may be that conviction and punishment therefor, as provided elsewhere in the act, would be wholly adequate to stop the alleged unlawful acts of the defendant without a resort to a court of equity. Besides, section 21, supra, which defines what shall constitute a common nuisance, also provides:

" 'That any person who maintains such a common nuisance shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000 or be imprisoned not more than one year, or both.'

"In effect, the government is here contending that it may at its election arbitrarily select its forum, either upon the law side or the equity side of the court, in order to initially determine whether defendant is guilty of the maintenance of such a nuisance. If this provision conferring jurisdiction in equity to declare the existence of a common nuisance is to be upheld at all as constitutionally valid, of necessity, I think, it must be upon some such ground that any and all other remedies are inadequate. Some facts ought to be pleaded tending to show such adequacy of the law remedy or remedies.

"Moreover, absent all such allegations in the bill, and, on a hearing, absent proof thereof, it is questionable whether defendant is not, upon any other view, deprived of the right of trial by jury, guaranteed to him by the Sixth Amendment of the Constitution. This arises from the fact that, after the granting of an injunction, any violations of such injunction constitute, under the provisions of section 21, supra, a contempt of court, which contempt of court is summarily triable by the court without a jury. Section 22 of the Volstead Act; section 24 of Act of October 15, 1914, c. 323, 38

Stat. 739 (Comp. St. sec. 1245d). And upon a finding by the court that the defendant is guilty of contempt he must be punished by a fine of not less than $500 nor more than $1,000, or by imprisonment, not less than 30 days nor more than 12 months, or by both such fine and imprisonment.

"I am mindful of what was said as to a jury trial in the case of Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205. But I do not think the point here involved is the same as the point there involved; for there the contention made, or at least the question seemingly discussed by the Supreme Court of the United States, was whether the defendant, in a trial before the chancellor sitting to hear the action in equity for abatement as a common nuisance and injunction, was entitled to a jury. The Supreme Court held that no federal constitutional guaranty was violated by a state statute which denied to the accused a jury on such a trial. Here the point is whether, in view of the definition of a nuisance as contained in section 21 of the Volstead Act, and in view of the misdemeanor there denounced for the maintenance of the nuisance, and of the statutes making the illegal manufacture and sale of intoxicating liquors punishable offenses under said act, there do not exist remedies at law which preclude equitable jurisdiction till the remedy at law has been followed and has measurably failed to accord relief, or until by opposite averments in the bill it can be seen that the remedies at law will not afford relief. State ex rel. v. Crawford, 28 Kan. 726, 42 Am. Rep. 182."

In United States v. Lot 29, etc., City of Omaha, 296 Fed. 729, 736-738, Judge Woodrough squarely decided that section 22 was unconstitutional, and says:

"Obviously, it would greatly simplify criminal procedure if all persons whom the chancellor deems guilty of criminal offenses could thereafter be laid under injunctive process, and all subsequent accusations against them could be dealt with by the chancellor, instead of by the tedious, uncertain, costly, and laborious process of jury trials. There is nothing new about this idea, and up to a short time before the Constitution of the United States was adopted there was undoubtedly a strong and aggressive party in the English Parliament still urging and insisting upon a revival of the powers of the Court of Star Chamber. That court proceeded in criminal causes without any of those restraints that hamper and retard the law courts in their jury trials, and was especially concerned with the suppression of treason and sedition. Traitors and seditious agitators also persist and continue their offending in spite of punishment, and in their cases also the procedure at law before the jury is laborious, costly, and uncertain. Their assembling and places of assembling are nuisances, as that word is defined. There is every possible reason why they should be dealt with summarily without jury trial that can be advanced for so dealing with bootleggers. But there is reason to believe that the simple declaration, 'All crimes shall be tried by jury,' was incorporated in the Constitution of the United States with a very determined purpose to absolutely prevent any court of criminal jurisdiction like that of the Star Chamber Court ever coming into existence in this country. . . .

"If, to suppress the liquor traffic, this power can be conferred upon equity courts, it can also be conferred to suppress the drug traffic, and I can see no very sound reason why it could not be used to suppress any crime in the calendar of crimes. If it can be so used, then the constitutional provision that all crimes shall be tried by jury would have no force ex propria vigore, but only by grace of Congress. We would have jury trials where Congress permits, but need have none where a procedure by injunction is provided for. The fact is the limitation of equity powers is so fundamentally a part of the equity system that the equity system cannot exist in disregard of those limitations. The court of equity may, in certain cases, abate existing nuisances, even though the nuisance is made up of criminal acts, and where it is proven that nuisances will continue, unless enjoined, equity may issue injunctions, but there is the natural and necessary limit of equity powers. When it is sought to confer powers upon a court of equity contrary to these limitations, the attempt must fail, because neither directly nor indirectly can the constitutional safeguards against one man power in criminal cases he erased. . . .

"But there is squarely involved the question of power that is important. Has the chancellor the power to evict him from his home and close it up for a year? Has the chancellor the power to judge this man? Can the chancellor in the future judge between him and his accusers? I feel it my duty to put the decision of this case upon the constitutional provision, and to decide, as the ground of dismissal of the case, that the act which attempts to confer such powers on the chancellor is contrary to the constitutional requirement that the trial of all crimes shall be by jury, and hence is null and void, as applied to the case at bar."

The subsequent decisions, both State and Federal, to support this novel doctrine of equity, rely on Mugler v. Kansas, 123 U. S. 623 and Eilenbecker v. Plymouth County, 134 U. S. 31, 34. It is to be carefully borne in mind that in the case of Mugler v. Kansas the issue was the effect of the "due process" clause of the Fourteenth Amendment—a restriction on the *States*. Under the present act we are dealing with a different constitutional safeguard, to-wit; the trial by jury.

Relying on Article III, section 2 of the Constitution and the Sixth Amendment, Hon. Joseph H. Choate, in his argument (p. 643) says, quoting from Story's Equity, "the question of nuisance or not must, in cases of doubt, be tried by a jury; and the injunction will be granted or not as that fact is decided," and that such failure was not due process of law; and quoting from Lord Eldon, further says a court of equity "has no jurisdiction in matters of crime." The effect of the decision in Mugler v. Kansas was that under the police power the State act did not deprive the defendant of his property without "due process," although Justice Field in his dissent (p. 617) said it amounted to confiscation; nor was the want of a jury trial a violation of "due process," although even Mr. Justice Harlan, who wrote the opinion of the majority (p. 674) said, "If the proof upon that point is not full or sufficient, the court can refuse an injunction, or postpone action until the State first obtains the verdict of a jury in her favor."

As to what is "due process," the case of Twining v. New Jersey, 211 U. S. 78, 110, is instructive. Justice Moody says, "Due process requires that the court which assumes to determine the rights of parties shall have jurisdiction, Pennoyer v. Neff, 95 U. S. 714, 733; Scott v. McNeal, 154 U. S. 34; Old Wayne Life Association v. McDonough, 204 U. S. 8, and that there shall be notice and opportunity for hearing given the parties, Hovey v. Elliott, 167 U. S. 409; Roller v. Holly, 176 U. S. 398; and see Londoner v. Denver, 210 U. S. 373. Subject to these two fundamental conditions, which seem to be universally prescribed in

all systems of law established by civilized countries, this court has up to this time sustained all state laws, statutory or judicially declared in regulating procedure, evidence and methods of trial, and held them to be consistent with due process of law. Walker v. Sauvinet, 92 U. S. 90, etc."

In Jordan v. Mass., 225 U. S. 167, 176, the court says: "In criminal cases due process of law is not denied by a state law which dispenses with a grand jury indictment and permits prosecution by information, nor by a law which dispenses with the necessity of a jury of twelve or unanimity in the verdict. Indeed the requirement of due process does not deprive a state of the power to dispense with a jury trial altogether. Hurtado v. California, 110 U. S. 516; Maxwell v. Dow, 176 U. S. 581."

Eilenbecker v. Plymouth County, 134 U. S. 31, 34, closely follows Mugler v. Kansas, holding that a jury is not essential to due process under such state acts or in contempt proceedings and that the first eight amendments to the Constitution are rules governing the Federal Courts only.

The argument of convenience has been advanced in favor of this species of artificial equitable legislation which dispenses with constitutional safeguards and barriers. In this connection Mr. Justice Harlan in Schick v. United States, 195 U. S. 65, 99, quoting from Blackstone, says:

"What was said by Blackstone when referring to summary proceedings authorized by acts of Parliament in particular cases may well be repeated, at this day, whenever it is proposed, upon grounds of convenience, to dispense with juries in criminal prosecutions, and thereby introduce a new mode for the trial of crimes. He said: 'And, however *convenient* these may appear at first (as doubtless all arbitrary powers, well executed, are the most *convenient*) yet let it be again remembered, that delays and little inconveniences in the forms of justice are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our Constitution; and that though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern.' Bk. 4, c. 27, 350."

It would appear to be a part of the creed of certain reformers that Constitutional right must yield to consideration of convenience and expediency. Why should this artificial crime, a malum prohibitum only, be exempt from those constitutional limitations and safeguards to which all crimina in se are subject? No doubt it is more convenient to transfer the criminal jurisdiction and forfeit and padlock property in a court of equity, than to be obliged to prove the guilt of a defendant beyond a reasonable doubt.

As in criminal procedure the defendant has the presumption of innocence, criminal statutes are also to be strictly construed. This is not necessary in equitable procedure. In the prosecution of crimes the accused "is to be confronted with the witnesses against him; and to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense." All these necessary formalities are avoided by an equitable procedure. Should this legislation be held constitutional, there will be no need of any "presentment or indictment of a grand jury." Also on the equity side of the court he may not assert his privilege of not "being compelled in any criminal case to be a witness against himself." Fifth Amendment.

In this connection an opinion by an able and scholarly judge deserves especial notice, to-wit; the decision of Judge Rogers in United States v. Reisenweber (C. C. A.) 288 Fed. 520, 523, 524. (Jan., 1923). This was a suit under section 22 and while the decision, relying on Mugler v. Kansas and Eilenbecker v. Plymouth County, sustained the equitable jurisdiction, the court says:

"The appellant's counsel stated that he did not maintain that in a clear case, where the place maintained is per se a nuisance and can be nothing else, a court of equity must await the verdict in the action at law. But, he said, if the thing sought to be abated as a nuisance is not per se a nuisance, but may or may not be a nuisance in accordance with the circumstances in which the premises may be used, it is the universal rule that a court of equity will not interfere to abate the thing complained of as a nuisance, until it has been found to be such by a jury in the action at law. We admit that the courts of equity at one time were very reluctant to exercise their jurisdiction over a nuisance, until after the right and question of nuisance had been first settled at law. In more modern times the same reluctance has not always been shown, it not being insisted upon in all cases that the nuisance should be first established at law. See 29 Cyc. 1221, and cases there cited." And again, the court says, "A place where intoxicating liquors are sold is not a nuisance at common law. Commonwealth v. MacDonough, 13 Allen (Mass.) 571. Prior to St. 5 and 6 Eliz. 6, it was lawful in England for anyone to keep an alehouse without a license; it being regarded as a legitimate means of livelihood, which anyone was free to follow. If it was disorderly, it was indictable as a nuisance. Stevens v. Watson, 1 Salk. 45."

It is certain our ancestors in Old and New England did not regard the manufacture and sale of liquor as an evil or a nuisance, as public houses were licensed. In fact the Legislature of Massachusetts in 1789 enacted legislation, the title of which was: "An act to encourage the manufacture and consumption of strong beer, ale and other malt liquors."

A great deal of mischief and confusion in this species of prohibitory sumptuary legislation has arisen from the use of the word "intoxicating"—a word which has and should have no place in legislation, as it emphasizes a possible rather than a necessary evil. This word "intoxicating" does not occur in the Massachusetts Revised Statutes of 1836, or in legislation prior thereto, the expression being "spiritous" liquors. On April 25, 1850, the Massachusetts Legislature substituted the word "intoxicating" for "spiritous" wherever the latter occurred in the Revised Statutes. The fact is, "intoxication" has been made the foremost National crime, and this species of sumptuary legislation—a malum prohibitum only—has been dignified by a place in the Constitution above burglary, arson, rape, forgery and murder—all crimina in se. Because of possible excess the temperate use of liquor known to all civilized nations for centuries has been forbidden. *Abusus non tollit usum.* If the manufacture and sale of liquor have thus been made a crime, is it illogical to insist that the punishment of such crime be subject to constitutional limitations and procedure?

Returning now from this digression it may be pertinent to observe the same tendency to evade a jury trial on the civil side in violation of Article XV of

the Massachusetts Declaration of Rights and of the Seventh Amendment.

In Raymond v. Parker, 137 Mass. 483, 486, which was a suit to collect a debt out of property alleged to have been fraudulently conveyed by the defendant, the court says, "The statute has changed the mode of procedure, but it would be trifling with the Constitution to hold that, by changing the forms of procedure, the substantial rights declared by it can be taken away. In all controversies which are within the purview of that article of the Declaration of Rights, the 'method of procedure' of a trial by jury must be held sacred, whatever the other forms of procedure may be."

In Scott v. Neely, 140 U. S. 106, 109, 110, the court, referring to the Seventh Amendment, says, "In the Federal courts this right cannot be dispensed with, except by the assent of the parties entitled to it, nor can it be impaired by any blending with a claim, properly cognizable at law, of a demand for equitable relief in aid of the legal action or during its pendency. Such aid in the Federal courts must be sought in separate proceedings, to the end that the right to a trial by a jury in the legal action may be preserved intact."

So, too, in bankruptcy procedure, while the majority of the court held that the Referee had summary jurisdiction in equity to adjudicate on a species of preferences to counsel, a minority held that the defendant was entitled to a jury trial, and Mr. Justice Day, delivering the dissenting opinion, said, in re Wood and Henderson, 210 U. S. 246, 263:

"If the benefit of a trial by jury can in that way be taken away it will take but little ingenuity on the part of lawmakers to provide for the total destruction of the right of trial by jury, a right which has been considered of priceless benefit in all English-speaking nations, and the protection of which is imbedded in the National as well as state constitutions."

And quoting from the language of Mr. Justice Bradley in Boyd v. United States, 116 U. S. 616, 635, he says, " 'Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizens, and against any stealthy encroachments thereon. Their motto should be *obsta principiis.*' "

Incidentally it may be observed that the enforcement legislation of the Fifteenth Amendment was repealed, and that the Bankruptcy Act, equally constitutional enforcement legislation, has been repealed three times, and while Congress has the *"power,"* there is no *obligation* to enforce the Eighteenth Amendment.

From the foregoing it may not be amiss now to enumerate some of the advantages of the trial by jury.

Ex Parte Milligan, 4th Wallace 2, 65, 120, 121, was a habeas corpus case, in which the petitioner was unjustly convicted without trial by jury by a court martial. Hon. Jeremiah S. Black, a former Chief Justice of Pennsylvania and Attorney General of the United States, in his learned brief, says:

"We do not assert that the jury trial is an infallible mode of ascertaining truth. Like everything human, it has its imperfections. We only say that it is the best protection for innocence and the surest mode of punishing guilt that has yet been discovered. It has borne the test of a longer experience, and borne it better than any other legal institution that ever existed among men. England owes more of her freedom, her grandeur, and her prosperity to that, than to all other causes put together. It has had the approbation not only of those who lived under it, but of great thinkers who looked at it calmly from a distance, and judged it impartially: Montesquieu and De Tocqueville speak of it with an admiration as rapturous as Coke and Blackstone. Within the present century, the most enlightened states of continental Europe have transplanted it into their countries; and no people ever adopted it once and were afterwards willing to part with it. It was only in 1830 that an interference with it in Belgium provoked a successful insurrection which permanently divided one kingdom into two. In the same year, the Revolution of the Barricades gave the right of trial by jury to every Frenchman."

And Mr. Justice Davis, delivering the opinion of the court, says, as to the Sixth Amendment:

"These securities for personal liberty thus embodied, were such as wisdom and experience had demonstrated to be necessary for the protection of those accused of crime. And so strong was the sense of the country of their importance, and so jealous were the people that these rights, highly prized, might be denied them by implication, that when the original Constitution was proposed for adoption it encountered severe opposition; and, but for the belief that it would be so amended as to embrace them, it would never have been ratified.

"Time has proven the discernment of our ancestors; for even these provisions, expressed in such plain English words, that it would seem the ingenuity of man could not evade them, are *now*, after the lapse of more than seventy years, sought to be avoided. Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world has taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority."

In Hurtado v. California, 110 U. S. 516, 549, Mr. Justice Harlan says:

"It is difficult, in my judgment, to over-estimate the value of the petit jury system in this country. A sagacious statesman and jurist has well said that it is 'the best guardian of both public and private liberty which has been hitherto devised by the ingenuity of man,' and that 'liberty can never be insecure in that country in which the trial of all crimes is by the jury.'

Mr. Madison observed, that while trial by jury could not be considered as a natural right, but one resulting from the social compact, yet it was 'as essential to secure the liberty of the people as any one of the pre-existent rights of nature.' 1 Lloyd's Deb. 430. 'When our more immediate ancestors,' says Story, 'removed to America, they brought this privilege with them, as their birthright and inheritance, as a part of that admirable common law, which had fenced round and interposed barriers on every side against the approaches of arbitrary power.' Story's Const. sec. 1779."

In Thompson v. Utah, 170 U. S. 343, 349, the court says:

"When Magna Charta declared that no freeman should be deprived of life, etc., 'but by the judgment of his peers or by the law of the land,' it referred to a trial by twelve jurors. Those who emigrated to this country from England brought with them this great privilege. . . . In Bacon's Abridgement, Title Juries, it is said: 'The trial *per pais*, or by a jury of one's country, is justly esteemed one of the principal excellencies of our Constitution; for what greater security can any person have in his life, liberty or estate, than to be sure of not being divested of, or injured in any of these, without the sense and verdict of twelve honest and impartial men of his neighborhood? And hence we find the common law herein confirmed by Magna Charta.'"

Capital Traction Co. v. Hof, 174 U. S. 1, contains an exhaustive opinion by Mr. Justice Gray, wherein he cites the history of trial by jury, the history of the Seventh Amendment, and the evolution of the jury system.

In Maxwell v. Dow, 176 U. S. 581, 611, Mr. Justice Harlan says:

"Blackstone has said: 'A celebrated French writer, who concludes that because Rome, Sparta and Carthage have lost their liberties, therefore those of England in time must perish, should have recollected that Rome, Sparta and Carthage, at the time when their liberties were lost, were strangers to the trial by jury.' 2 Bl. Com. 379." And adds, "And this court has declared that 'the trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy.' Parsons v. Bedford, 3 Pet. 433, 466."

In Hawaii v. Mankichi, 190 U. S. 197, 244, Mr. Justice Harlan says:

"It is an indisputable fact in the history of the Constitution that the instrument would not have been accepted by the required number of States, but for the promise of the friends of that instrument, at the time, that immediately upon the adoption of the Constitution, amendments would be proposed and made that should prevent the infringement, by any *Federal* tribunal or agency, of the rights then commonly regarded as embraced in Anglo-Saxon liberty; among which rights, according to universal belief at that time, were those secured by the provisions relating to grand and petit juries. Whatever may be the power of the States in respect of grand and petit juries, it is firmly settled that the Constitution absolutely forbids the trial and conviction, in a *Federal* civil tribunal, of any one charged with crime, otherwise than upon the presentment or indictment of a grand jury, and the unanimous verdict of a petit jury, composed, as at common law, of twelve jurors."

In McKeon v. Central Stamping Co. (C. C. A.), 264 Fed. 385, 387, 389, Judge Buffington calls particular attention to the language of the Seventh Amendment in that not a trial by jury is preserved, but "the trial by jury," meaning such a jury trial as was known to our English ancestors, and quotes from Blackstone as follows:

"'The trial by jury has been, and I think ever will be, looked on as the glory of the English law. . . . It is the most transcendent privilege which any subject can enjoy, or wish for, that he cannot be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbors and equals.'"

It is an interesting historical fact that the provision for a jury in civil cases was rejected in the original Constitution, and Alexander Hamilton, in apologizing for its omission in the original instrument, speaks as to the advantages of jury trials in criminal cases as follows ("The Federalist," No. 83, Lodge's Edition, p. 521):

"Arbitrary impeachments, arbitrary methods of prosecuting pretended offenses, and arbitrary punishments upon arbitrary convictions, have ever appeared to me to be the great engines of judicial despotism; and these have all relation to criminal proceedings. The trial by jury in criminal cases, aided by the *habeas-corpus* act, seems therefore to be alone concerned in the question. And both of these are provided for, in the most ample manner, in the plan of the convention."

Instead of the essentials of the jury of the Constitution Section 22 and 24 have substituted the *discretion* of the Chancellor. Of this discretion Lord Camden said: "The discretion of the judge is the law of tyrants. It is always unknown; it is different in different men; it is casual, and depends upon constitution, temper, and passion. In the best, it is oftentimes caprice; in the worst, it is every vice, folly and passion to which human nature is liable." St. Tr. VIII, 58. May's Constitutional History of England, Vol. II, p. 556. Both Chief Justices Scroggs and Jeffries were not unknown to the framers of the Constitution.

A word as to contempt procedure and punishment.

In Bessette v. W. B. Conkey Co., 197 U. S. 324, 328, the two classes of contempts as criminal and punitive, or civil and remedial, are defined. Certainly Section 24 relates to criminal contempts only, as penalty and punishment are prescribed. That such criminal contempts fall within the requirement of a trial by jury has received discussion in the case of Gompers v. United States, 233, U. S. 604, 610, and very recently in Michaelson v. United States, 266 U. S. 42, 64-67.

In the Gompers case Mr. Justice Holmes, delivering the opinion of the case, says:

"It is urged in the first place that contempts cannot be crimes, because, although punishable by imprisonment and therefore, if crimes, infamous, they are not within the protection of the Constitution and the amendments giving a right to trial by jury, etc., to persons charged with such crimes. But the provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth. *Robertson v. Baldwin*, 165 U. S. 275, 281, 282. It does not follow that contempts of the class under consideration are not crimes, or rather, in the language of the statute, offenses, because trial by jury as it has been

gradually worked out and fought out has been thought not to extend to them as a matter of constitutional right. These contempts are infractions of the law, visited with punishment as such. If such acts are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech. So truly are they crimes that it seems to be proved that in the early law they were punished only by the usual criminal procedure, 3 Transactions of the Royal Historical Society, N. S. p. 147 (1885), and that at least in England it seems that they still may be and preferably are tried in that way. See 7 Halsbury, Laws of England, 280, *sub.* v. Contempt of Court (604); Re Clements, v. Erlanger, 46 L. J. N. S., pp. 375, 383. Matter of Macleod, 6 Jur. 461. Schreiber v. Lateward, 2 Dick, 592. Wellesley's Case, 2 Russ. & M. 639, 657. In re Pollard, L. R. 2 P. C. 106, 120. Ex parte Kearney, 7 Wheat. 38, 43. Bessette v. W. B. Conkey Co., 194 U. S. 324, 328, 331, 332. Gompers v. Bucks Stove & Range Co., 221 U. S. 418, 441."

The case of Michaelson arose under the Clayton Act, which expressly provided for a jury trial in cases of boycott. Under a similar statute in Massachusetts, the Supreme Court in Walton Lunch Co. v. Kearney, 236 Mass. 310, arrived at an exactly opposite decision and held that the statute was unconstitutional, as courts could not be deprived of their inherent power both in criminal and civil contempts to punish without any right on the defendant's part to a jury trial.

Notwithstanding this same argument was advanced in the Michaelson case the court declared the Clayton Act to be constitutional, and says:

"But the simple question presented is, whether Congress may require a trial by jury upon the demand of the accused in an independent proceeding at law for a criminal contempt which is also a crime. In criminal contempts, as in criminal cases, the presumption of innocence obtains. Proof of guilt must be beyond reasonable doubt and the defendant may not be compelled to be a witness against himself, *Gompers v. Bucks Stove & Range Co., supra,* p. 444. The fundamental characteristics of both are the same. Contempts of the kind within the terms of the statute partake of the nature of crimes in all essential particulars. 'So truly are they crimes that it seems to be proved that in the early law they were punished only by the usual criminal procedure. Three Transactions of the Royal Historical Society, N. S. p. 147 (1885), and that at least in England it seems that they still may be and preferably are tried in that way.'"

In the recent decision of United States v. Grossman, 266 or 267 U. S.—the court has upheld the right of the President to extend a pardon in the case of a crime forbidden under section 22.

In conclusion it may be confidently asserted that the recent trend of the decisions of the Supreme Court of the United States is to extend the protection and safeguards of the Constitution in all justiciable and non-political controversies. It certainly, therefore, is not unreasonable to hope that, as the court seems disposed to insist on a strict compliance with Article III Section 2 of the Constitution as to all crimes inclusive of criminal contempts, it may be expected to extend this requirement to criminal nuisance as well, and pronounce section 22 and 24 unconstitutional, as it has already declared section 35, because of the Constitution mandate, that, "The Trial of All Crimes, except in Cases of Impeachment, shall be by Jury."

"Remove not the ancient landmark which thy fathers have set."

Boston, March 27, 1925.

DEPARTMENT OF PROFESSIONAL ETHICS

The Third Problem: Lawyer's Duty to the Bar

By HENRY UPSON SIMS
Of the Birmingham, Ala., Bar

RECOGNIZING that the lawyer's duty to the public is to cooperate with the courts in the administration of justice, and that his duty to his clients is not to be deemed incompatible with that first obligation to the state and the courts (all of which it has been attempted to prove in preceding articles), we are ready to recognize the correctness of the old theory that lawyers are officers of the courts in which they practice, and as such are under a definite duty to each other as fellow-officers of the law.

But the relation of fellowship in the administration of the law nevertheless presents a great problem. It is easy enough to say that lawyers must cooperate; that the clients and not the attorneys are the litigants, and that good feeling, courteous treatment, and sincerity must always characterize lawyers' dealings with each other. And among the older and better poised lawyers, especially in the smaller communities, that status is probably fairly well maintained. But lawyers, after all, are human, and as freedom of speech upon professional and litigated matters is limited by the fundamentally necessary principle that clients' confidences must be held inviolate, it is easy for young and less experienced lawyers to be swept into the notion that litigation is a game not unlike football and that he plays it best who plays it most skillfully, deceiving by false signals where possible, and interfering by force where effective to the end in view.

Of course such disregard of the obligation to effectuate justice, and of the obligations of lawyers to each other, has always been broadly condemned, but it can be eliminated only by bar organization and the enforcement by the bar of codes of ethics; and bar organization in America has heretofore been loose, as contrasted with bar organization in England. In the early days bar organization did not appear so necessary, and the vaunted freedom

of thought and action obtaining generally throughout our individualistic county, may have been deemed more important than the order obtainable by strict surveillance of professional conduct.

Legal ethics was taught only by example, and occasional pronouncement, and bar association was merely informal; and discipline and disbarment of attorneys was solely in the hands of the courts; which meant of course, that they were applied only to the most flagrant offenses.

Now, however, a bar association has been established in all the states, and agitation for comprehensive statutory bar organization has been begun, and an effective enforcement of definite rules of professional conduct is being universally demanded throughout the country. Therefore it behooves us to determine more concretely than appears in the American Bar Association Code of Ethics of 1908, what is the lawyer's duty to the Bar, and what specific principles of conduct the lawyers should observe to increase their efficiency as officers of justice.

The Code of Ethics says (Canon 29) that he should strive to uphold the honor and to maintain the dignity of the profession. That includes in the first place a duty to join local and state bar associations, where membership in these associations is merely voluntary, and to join the American Bar Association as soon as he has become qualified by the requisite three years of practice to do so. A man may just as well claim to be a devotee to the Christian religion outside of the organized churches, as to uphold sincerely the ideals of the legal profession outside of the organized bar associations.

But of course to be inside the ranks of the associations without observing their ethical principles and without actively striving to enforce them, is like being enrolled among the members of a church without upholding its tenets or trying to serve God as one of his professed children.

It is the efficiency of the organizations of the bar that is to be desired. A large organization is not necessarily a successful organization; and even a successful organization is merely a means to an end. What society demands is an effective organization of the bar to contribute to the effective administration of justice, and to maintain the integrity of the practice of the profession outside of the courts. And while society in America has not done for the bar what we saw in the second article of this series society had done for the bar in England, no one need expect society to aid the bar more than an organized bar demands and appears to deserve. That problem will be discussed in a later article; and there is a good deal to be said about it. But it is sufficient for the present to observe that the first need of the profession is living, thriving, bar organization all over the country.

In the second place if we are striving to uphold the honor and maintain the dignity of the profession, "a duty to the public and to the profession devolves upon every member of the bar, having knowledge of" . . . "practices upon the part of any practitioner" which justify disbarment, "immediately to inform thereof to the end that the offender may be disbarred." (Canon 28.)

Too many of us are inclined to degenerate to the social immaturity of school boys, and justify a failure to inform by confusing information with tale-bearing, especially where neighbors would be subjected to investigation, and ill feeling would result. Such reticence on the part of the righteous will neutralize all the resolutions of bar meetings and render nil the publication of canons. If the bar wink at misconduct in their fellows, they cannot object to bearing as a body the reprobations of the laity, and effective uplife of the profession will become hopeless. Let us recognize therefore that at the bar, if we are faithful to our profession, we are each to a great extent our brothers' keeper, and so declare ourselves before the world.

In the third place, if we are to strive to uphold the honor and dignity of the profession, we must not stir up strife and litigation by volunteering advice to bring law suits or by soliciting employment to assert claims. (Canon 28.)

The origin of this conception is founded in the history of the Common Law. "Maintenance is when a man maintains a suit or quarrel to the disturbance or hindrance of right." (Co. Lit. 368. b; Comyn's Digest, V. 5, p. 26, A1.) And "Common Barratry," whether by professional lawyers or others, was "the offense of frequently exciting and stirring up suits and quarrels between his majesty's subjects, either at law or otherwise." (4 Blackstone Com. 134.)

A lawyer, as an officer of court, is a peacemaker and adjuster of disputes, and his office is incompatible with seeking their instigation. If under modern conditions there are more lawyers than can be kept busy with the proper carrying on of the profession, then the solution lies in restricting the number of lawyers, rather than in turning them loose to stir up claims which might not have been asserted but for outside instigation. And if, on the other hand, there are claims which the ignorance of their owners leaves unasserted and society suffers from the injustice of the responsible not being compelled to make reparation, then the remedy lies in extending the field of criminal responsibility for failure to offer amends. It is better that the state treasury should profit by the oversight of possible just plaintiffs, than that many should become plaintiffs without just claim to recover.

In the fourth place, it is against the dignity of the profession for a lawyer to advertise for clients or to unduly proclaim his availability and capacity to serve (Canon 27). The reason for the repression of such activities is the same as that for forbidding maintenance and barratry; and the answer to the modern demand is that if the number of lawyers were less, the clients would discover ways of finding the lawyers instead of the lawyers being subjected to the temptation of finding the clients. But of that more anon, when we come to discussing the duty of the public to the bar.

This article may well close by emphasizing the fifth point in which the lawyer owes support to the dignity of the bar. He should enter into no agreements with laymen by which he shares with them his fees or the returns for his personal labor. This is but a corollary of Canons 27 and 28. If a lawyer can divided with a layman, or if he can profit by employment by laymen who in turn collect and solicit the clients, there is no limit to a lawyer's

power to obtain business and stir up litigation, without any apparent responsibility for its source. The lawyer must, therefore, be a worker by himself, or with lawyers only, so that his connections and his acts will be open and above board; and thereby maintain his character and his profession above suspicion of wrong.

Proper Professional Conduct

Opinion 6 of the Committee on Professional Ethics and Grievances—Partnership Name—Continued Use Thereof By Surviving and Succeeding Partners

The Committee was requested by a local bar association to express its opinion as to the propriety of the surviving partner or partners continuing a law practice under the partnership name, after the death of a partner whose name is included in the firm name.

The Committee's opinion was stated by Mr. Taylor:

It, of course, does not admit of question that a surviving partner may not use the firm name for the purpose of misleading former clients of the firm or others into the belief that a deceased partner is still alive and is still a factor in the business of the firm. Such a course of procedure would be on a par with any other fraudulent practice made use of for the purpose of attracting business and would be equally reprehensible whether or not the continued use of the firm name is permitted by the local statutes or common law prevailing in the community. Because of this, the surviving partner continuing to use the firm name should be particularly careful to comply with all requirements of law or custom in regard to the publication of the fact of the death of his partner and his continued use of the name and to clearly indicate on his firm stationery and in all other reasonable ways that the firm name is merely the name under which he is conducting business.

The question is raised whether the continued use of the firm name by a surviving partner, irrespective of any intent to deceive, is of itself contrary to the ethics of the legal profession.

The practice of continuing to use a firm name after one or all of the original partners are dead or have ceased to be members of the firm has prevailed in New York and in other jurisdictions for many years. The same provisions of law as to the use of such names prevail in the case of legal firms as in the case of firms generally, and there is no ground for believing that the propriety of this practice has in the long course of years in which it has prevailed been seriously called in question. The fact undoubtedly is that the use of partnership names by surviving and succeeding partners is not intended to mislead anyone as to the personnel of the firm, ought not to mislead anyone and does not mislead anyone. The firm name does not, in view of the long established practice and usage, create any presumption that the former partners whose names appear in the firm title are still active members of the firm, but merely indicates that the firm is a continuation of the firm in which they were once partners. Of course, in most cases, the partner's surname alone is used in the firm name. If the continued use of the firm name carried the implication that a partner having such a surname was still a member (which, however, according to custom and practice it does not) there would still be no implication that the partner having such surname was the original partner. If the continued use of the name is to be regarded as unethical because misleading, the continued use of the name would be just as misleading and therefore just as unethical if in place of the deceased partner there were another partner having the same surname. It is certain, however, that the use of the firm name "Jones, Smith & Robinson" would not be regarded as misleading or unethical because the "Smith" of the present firm is a different man from the "Smith" who was the original partner. Equally, the continued use of the name would not be misleading or unethical where the original "Smith" is dead and his successor bears a different name or there is no successor. Custom, usage and the statutory provisions all recognize that a firm name in the case of a law firm as well as in the case of any other firm does not identify the individual members of the firm.

The necessary conclusion is that the continued use of a firm name by a surviving partner is not in and of itself unethical. This conclusion appears to be fully borne out by the authorities in *Rowley*, v *Modern Law of Partnership, 331*. It is said:

> In many cases it has been held that good-will cannot arise in a professional business which depends on personal skill and confidence. However, it is recognized that lawyers and physicians may sell their business or sell an interest in it to younger members in the profession who become partners, and gain some advantage from associating with an older man in the profession, and in that sense there is a good-will in professional pursuits which is of value.

In *26 Halsbury's Laws of England 843*, the legal right of solicitors to continue business under the old firm name is recognized:

> Unless otherwise provided by the partnership deed, the interest of a partner in the business of a solicitor ceases upon his death and merges into the interests of the surviving partners. Upon the dissolution of a solicitor partnership without any sale or assignment of the goodwill of the business and without any provision as to the use of the firm name, each of the partners is entitled to carry on business under that name, provided that he does not by so doing expose his former partners to any risk of liability, which must depend upon the circumstances of each case.
>
> See: Bunn v. Buy (1803) 4 East 190: Burchell v. Wilde (1900) L. R. 1 Ch. Div. 551; Levy v. Walker, 10 Ch. D. 436; Aubin v. Holt (1855) 2 Kay & Johnson, 66.

The necessary corollary to the conclusions that have been stated is that, if in a local community there is a custom whereby a firm name serves to identify the individual members of the firm, so that the use of the firm name amounts to a representation that certain individuals are members of the firm, the continued use of the firm name might be misleading, and the local custom should be observed. A special situation to which the conclusions stated are not necessarily applicable arises when a member of a law firm goes on the bench and the continued use of his name in the firm name would indicate the former connection between the Judge and the firm. Under such circumstances propriety would frequently require that the name of the Judge should be dropped from the firm name.

Doubtless many cases will arise where the propriety of the continued use of the firm name must be decided according to the special facts and general principles of propriety, but these exceptional cases do not detract from the truth of the general proposition which has been stated.

TENTATIVE PROGRAM OF DETROIT MEETING

WE print in this issue a tentative program of the forthcoming meeting at Detroit of the American Bar Association and of subordinate and affiliated bodies. A complete list of speakers will be furnished later. Special attention is called to the announcement concerning reduction of railroad fares in connection with the meeting. The arrangements for what is expected to be one of the most important, interesting and largely attended gatherings of the Association are progressing rapidly, and those who attend are assured a program and recreation features that will make the trip well worth while.

Meetings of Sections and Allied Bodies

Comparative Law Bureau

The Comparative Law Bureau will hold one session on Tuesday afternoon, September 1, hour to be announced later. The chairman will make an address and routine business will be transacted.

Conference of Bar Association Delegates

The Conference of Bar Association Delegates will hold an all day meeting, three sessions, on Tuesday, September 1. The program, speakers and place of meeting will be announced in a later number of the Journal.

Criminal Law Section

The Criminal Law Section will hold two sessions on Tuesday, September 1. The following speakers will address the Section:

Mr. Alfred Bettman, Cincinnati, Ohio, will speak on "The Possibility of Improvement of Criminal Justice by Administrative and Procedural Reforms in Connection with Prosecution."

Prof. Charles K. Burdick, Cornell University Law School, will speak on "Suggestions for Reform in Criminal Procedure Through State Action."

Hon. Herbert S. Hadley, Chancellor of Washington University, St. Louis, Mo., will speak on "The Possibility of Improving Criminal Justice by Statutory Changes and Constitutional Amendments."

Col. Henry Barrett Chamberlain, of the Chicago Crime Commission, subject of whose address will be announced later.

Judicial Section

The Judicial Section will meet on Tuesday, September 1, and will hold one or two business sessions, to be followed by a dinner in the evening of the same day. The speakers who will address the Section, and the subject of their addresses will be announced in a later issue of the JOURNAL.

Section of Legal Education

The Section of Legal Education and Admissions to the Bar will hold one session on Tuesday, September 1. Their program, speakers and place of meeting will be announced later.

Patent Section

The Patent Section will hold a dinner on the evening of September 1, which will be preceded by one or two business sessions. Detailed program, speakers and place when meetings and dinner will be held, will be announced later. The Chairman of the Section is anxious to have a good attendance, and would like all members to be present.

Section of Public Utility Law

The Section of Public Utility Law will meet on Monday afternoon, August 31, and on Tuesday morning, September 1, and will hold a dinner Tuesday evening. Detailed program of the business meetings, and announcement concerning the dinner will appear in a later issue.

The American Bar Association

Wednesday, September 2

Morning—Opening session. Annual address of the President. Nomination of members of General and Local Councils.

Afternoon—Joint Session with Michigan State Bar Association. (Speakers will be announced later.)

Evening—(Speakers to be announced later.) President's Reception at Book-Cadillac Hotel.

Thursday, September 3

Morning—Reports of Officers, Sections and Committees.

Afternoon — Reports of Committees (Continued).

Evening—(Speaker to be announced later).

Friday, September 4

Morning—Reports of Committees (Continued). Election of Officers. Adjournment sine die.

Afternoon—Lake boat trip.

Evening—Annual dinner for members. Dinner to the ladies.

Saturday, September 5

All day trip to Ann Arbor as guests of the Michigan State Bar Association and Detroit Bar Association.

Reduced Fares for the Detroit Meeting

Through the courtesy of the Central Passenger Association, a new plan of securing reduced rates will be inaugurated this year. This plan has been concurred in by the Trunk Line, New England, Southeastern, Western, Southwestern and Trans-Continental Passenger Associations, so that the same reduction will be available to members from all parts of the country. Instead of the certificate plan heretofore used, we will this year adopt the "Identification Certificate Plan," which secures for each member and dependent members of his or her family, a rate amounting to fare and one-half, when ticket to Detroit and return is purchased. These certificates will be sent to all members in advance of the meeting, to be used in securing their tickets, after which nothing is required to be done, except to present return ticket for validation by the Detroit ticket agent upon departure for home. The turning in of certificates to the Secretary's of-

fice for validation, and the uncertainty as to the securing of a reduction, will be eliminated under this new plan.

As figures showing the approximate attendance at the Detroit meeting to be large enough to warrant the concessions which have been granted, were furnished the Railroad Passenger Associations, it is hoped that all members attending the meeting will use the certificates which will be sent them, so there will be no difficulty in securing similar concessions hereafter.

The Passenger Associations above referred to have also made the reduced rates applicable to the meetings of Sections and Allied Bodies, and tickets will be sold on a date that will enable members to reach Detroit on August 25, the date on which the Conference of Commissioners on Uniform State Laws convenes. The return limit is September 11. In certain sections of the country summer tourist rates will be lower than the rates obtainable by the certificates to be sent out, in which case members should avail themselves of the lower rate. Additional information, if desired, can be obtained from the Secretary's office.

WILLIAM C. COLEMAN, Secretary.

Conference of Commissioners on Uniform State Laws

August 25 to 31, 1925

The National Conference of Commissioners on Uniform State Laws will meet at the Hotel Statler, Detroit, Mich., August 25 to 31, 1925. There will probably be a morning and afternoon session on each of the above mentioned dates. Among the proposed Uniform Laws to be considered are acts affecting the following subjects:

Arbitration.
Incorporations.
Real Property Mortgages.
Use of Highways by Vehicles.
State Inheritance Taxation.
The Sale of Securities.
Chattel Mortgages.
Acknowledgement of Deeds.
Extradition of Persons Charged With Crime.
Compulsory Attendance of Non-resident Witnesses.
One Day's Rest in Seven.
Child Labor.
Federal Primaries.
The Sale and Possession of Firearms.
Public Utilities.
Sale of Drugs.
Filing of Federal Liens.

A detailed program will be published later.

GEORGE G. BOGERT, Secretary,
Ithaca, N. Y.

We learn from Chairman Fred G. Dewey, of the Detroit Committee on Arrangements, that on August 26, 8 p. m., there will be a reception to the Commissioners and ladies of their party at the Detroit Athletic Club, and that there will also be a moonlight boat ride and a visit to the Highland Park Plant of the Ford Motor Co., during their meeting. A visit to Ann Arbor has been scheduled for Sunday, August 30.

RATES DETROIT HOTELS FOR AMERICAN BAR ASSOCIATION CONVENTION, DETROIT, MICH., SEPT. 2-4

(European Plan)

Hotel	No. of Rooms	Single without	Double without	Single with	Double with	Suites
Book-Cadillac—Corner Michigan Ave. and Washington Blvd.	1,200	.....	.....	$4–5–6–7	$6–7–8–9–10	$14–18
Statler—Washington Blvd. and Park Pl.	1,000	.....	.....	$3.50–4–4.50	$6–6.50–7–7.50–10†	$12–18
Tuller—Adams Ave. and Park Pl.	800	.....	.....	$3–3.50–3.75–4	$6–6.50–7–7.50–8‡	.....
Hotel Wolverine—Witherell and Elizabeth Sts.	500	.....	.....	$3–3.50–4–4.50§	$7–8	.....
Hotel Fort Shelby—Lafayette Ave.	450	$2.50	$3.50	$3–3.50–4	$4.50–5–6	.....
Hotel Madison-Lenox—Madison Ave. and John R. St.	300	$2	.....	$2.50–3–3.50	.....	$5–10
Hotel Norton—Jefferson Ave. and Griswold St.	247	$2–2.25–2.50	$3.50–4	$2.75–3	$4.50–5	.....

†Ten dollar rooms, extra large, facing park.

‡Two hundred and fifty rooms with double bed and two wall beds with combination tub and shower bath; will accommodate from two to four persons—3 persons, $3 each; 4 persons, $2.50 each; 2 persons, $3.25 each.

§All single rooms have double bed and price when occupied by two persons is $2 more for each room.

The various hotels, in the order named, are the following distance from the Book-Cadillac Hotel and Cass Technical School respectively: 3-4; 4-3; 7-6; 4-8; 6-7; 5-11 blocks.

N. B.—There are two or three apartment hotels approximately one mile from the Book-Cadillac Hotel, where accommodations can be obtained if desired. Address all communications as to reservations to Oscar C. Hull, Chairman Committee on Reservations, Dime Savings Bank Bldg., Detroit, Mich.

PRIMARY LESSONS FOR JURORS

Brief Notice in May Journal of Primer Giving Some Essential Preliminary Information as to Duties to Jurors in Second Judicial District of New York Has Aroused Such Interest That Document Is Herewith Reprinted in Full

TO Each Juror: Before you come to court, you are to read and, if necessary, re-read this primer, so that you may properly discharge your duty as a juror.

This primer is designed to inform you as to your duty as a juror. It is written so that laymen may understand it. Words in common legal use have been avoided until after their meaning and effect have been stated. The order of the questions and answers has been determined by that principle.

A juror's ignorance of his obligations interferes with the proper performance of his duties and with the work of the court. It need not and will not exist if you read this primer.

Q. Who are involved in the ordinary civil case?

A. A plaintiff and a defendant.

Q. Who is the plaintiff?

A. He is the one who is making a claim against another person.

Q. Who is the defendant?

A. He is the one who is opposing the claim made by a plaintiff.

Q. What makes up a court for the trial of such a dispute?

A. A judge and a jury.

Q. What does the jury do?

A. The jury decides the disputed questions of fact. The jurors are the sole judges of the facts. Their decision, if it has on any reasonable view the support of the believable evidence, is final and cannot be disturbed. It is very important therefore that the jury decide the facts honestly and correctly.

Q. Upon what does the jury base its decision on the facts?

A. The jury may base its decision on the facts only upon the evidence received from the witnesses, and any exhibits that may have been received in evidence. The jury must not decide any questions of fact upon anything outside of the evidence in the case. The jury is not to decide any question of fact upon any statement of fact made by the judge or the lawyer for either of the parties to the dispute unless such statement of fact is based upon evidence in the case, which the jury accepts as being true. The jury's recollection of the facts and not the recollection of either lawyer or the judge is to control.

Q. May the jury draw inferences of fact?

A. The jury may draw any inferences which, in their opinion, can be reasonably and honestly drawn from any fact which is directly established by the evidence which they believe is true.

Q. How should personal interest of witnesses affect the jury in weighing the evidence?

A. The jury is to consider what personal interest each witness, whose testimony they may be considering, has in the case. This will shed light on whether the witness is allowing his personal interest in the outcome or his interest in the people involved to affect the accuracy or truthfulness of his evidence. Some witnesses allow this to affect them and others do not.

Q. Is the jury to weigh the evidence by counting the number of witnesses?

A. No. The mere number of witnesses in and of itself does not determine weight. The jury must determine the weight of testimony upon the basis of its quality. Sometimes the weight is with the side having the larger number of witnesses and sometimes the weight is with the side having the smaller number of witnesses.

Q. How is a juror to determine the quality of testimony?

A. A juror is to determine its quality upon the basis of this test: Does the testimony have such a persuasive effect upon your judgment that you are induced to believe it. Such testimony is the believable and credible testimony. Such testimony furnishes the basis upon which you should weigh the evidence.

Q. What will enable a juror to determine what testimony is believable and credible?

A. There are several ways. One is observing the manner in which a witness testifies to decide whether he is evasive or straightforward. Another is determining whether the witness had the opportunity to know that which he says he knows, by being where he could have known or where he had a good opportunity to see or hear that which he says he saw or heard. Another is considering whether the witness was sufficiently observant to have seen or heard that which he says he saw or heard. Another is considering whether the witness was sufficiently observant to have seen or heard that which he says he saw or heard, or is of a sufficient degree of intelligence to be able to recollect or remember that which he says he saw or heard. Another is whether it would be reasonably probable that he would or would not have seen or heard that which he says he saw or heard. All these things help jurors to decide whether testimony is believable and credible, together with the final test in a juror's mind as to whether the witness's story rings true, the deciding of which is partly a matter of sensing or instinct or intuition.

Q. When it appears that a witness has testified to something that is not true, should that witness's testimony be rejected in its entirety?

A. Under certain conditions jurors *may* do so. Note that the word is *may* not *must*. If a witness testifies to that which the jury becomes satisfied is untrue, they may reject his entire testimony, if two things are true: One that the fact which has been falsely testified to is *material;* that is, has a material bearing upon the disputed question that is to be decided, and the second is that the witness *wilfully*, that is, knowingly or purposely testified falsely to that material fact. If they believe that he did not knowingly testify falsely, but merely made an honest mistake; or if the testimony which is false is not material or important the jury may not reject such witness's entire testimony, but may con-

sider this fact of error or falsity in deciding what value is to be given to his testimony. This makes it important to determine whether that which is incorrectly testified to by any witness is testified to falsely as a matter of evil purpose on his part with the intent of misleading, or whether it is an honest error due to thoughtlessness or nervousness or due to his having become "rattled" while in the witness chair.

Q. What is an "issue" for a jury in a case?

A. It is a question of fact or a disputed point of fact. The disputed questions of fact in a civil suit are called the issues existing between the plaintiff and the defendant. When in a civil action, the law requires either the plaintiff or the defendant to prove an issue or a disputed point in a case, we say that such party has the burden of proof. The party having the burden of proof on an issue or a disputed point in a civil case must establish his claim by a fair preponderance of evidence.

Q. When can it be said that the evidence preponderates in favor of one side or the other?

A. The burden of proof on an issue is not sustained where the evidence of the one having the burden of proof strikes an even balance in the minds of the jurors with the evidence of the other side. This, of course, means the believable and credible evidence. When the evidence of the person having the burden of proof on any issue mereily strikes an even balance with the other side, or where the other side's evidence outweighs his evidence, such a person must be defeated on that particular issue. If his evidence outweighs the evidence of the other side then he should have the issue decided in his favor. The person having the burden of proof on an issue must win on that issue on his own strength and not on his opponent's weakness.

Q. What does the judge do in the trial?

A. The judge decides the questions of law, among others as to what evidence should or should not be admitted. The judge's rulings are based upon the results of hundreds of years of experience in courts in the determining of questions of fact. The fact that one side or another objects to a particular question should not and may not be made the basis of any inference for or against that person's side. Under the law each side has a perfect right to object to any question asked a witness or to any other evidence offered. Whether the judge decides that the question or the evidence is proper or improper does not concern the jury because that is a question of law for the judge to decide. The judge is the *sole source* of the law in the case. The jury, by their oaths, are required to apply the law as the judge gives it to them, whether they approve of it being the law or not. If they fail to do that, the jurors violate their oaths and destroy the basis for the impartial administration of the law and are faithless to their high trust and duty.

Q. Why should the jury be required to accept the law from the judge and no one alse?

A. If this were not required there would be utter confusion in the administration of the law. If each juror applied his own idea of the law or what he thinks it should be, you might have twelve different standards of law in a case and those standards would vary in every case. The law would therefore differ in every case and different sets of persons under the same circumstances would receive different decisions on the same or similar facts. This would not be an impartial administration of the law. This makes it necessary as a practical thing that but one person be allowed to state what the law is. The absolute need for uniformity makes necessary as a practical thing the accepting of the law from that one person, the judge, and from no one else and makes reasonable the requirement that each juror shall set aside his own individual idea, if he has any, as to what the law is or should be. If the judge is wrong, that can be determined in a proper manner. It is not a part of the jury's duty to pass judgment upon whether he is right or wrong.

Q. Where does the judge get the law from?

A. He gets the law from the constitution, adopted by the people directly, from the statutes passed by Legislatures and from the decisions of the courts themselves, based on human experience for hundreds of years. When the law is in need of change, the Legislatures or the people themselves have the power to and do change it. Until the people or the Legislatures do change it, it should be and must be accepted and applied. It is no part of jurors' duty to modify it or change it in applying it to the facts they are called upon to decide. If they assume to do such a thing they are violating their oaths of office and are false to their trust.

Q. What consideration should jurors give to what the lawyers state to be their idea of the facts, or what the lawyers in their arguments state to be the law that is to be applied to the facts?

A. The jury should disregard any statement of fact, or any arguments based upon any fact stated by a lawyer, which facts they do not think have been proven by the evidence in the case, or which line of reasoning they do not accept as sound. When it is founded upon facts accepted as true by the jury, they are free to adopt the reasoning advanced by counsel on either side. The jury is to ignore or disregard any statement of law made by the lawyers. The judge is the sole source of the law. The judge states the law in his talk or charge at the end of the case.

Q. What effect should jurors give to the opinions of medical witnesses or other experts?

A. Jurors should give no effect to the opinion of any expert witness, medical or otherwise, unless they accept as true the facts upon which the opinion is based, and also conclude that the opinion is the honest opinion of the witness. If they believe the opinion is unsound even though they accept the facts upon which it is based as true, or if they reject the facts upon which it is based as not being true, then jurors should reject and disregard the opinion.

Q. When testimony is stricken out by the judge how should jurors give effect to such action?

A. By ignoring the testimony stricken out as if they had never heard it uttered.

Q. How should jurors take up in their jury room the consideration of the disputed questions of fact?

A. They should approach the matters submitted to them in a calm manner; they should avoid heated disputes; they should avoid becoming partisans on either side; they should discuss and confer with a single purpose of determining what the truth is; they should seek to reach their determination by applying the tests already indicated to be applied. Every juror should respect every other juror's judgment where that judgment seems to be founded upon a reasonable basis. Each juror should be willing to yield up his own judgment when it becomes apparent that he has overlooked or failed to give sufficient weight to some element that some other juror convinces him should be given greater weight; they should by every reasonable, honest means seek to arrive at an agreement that will be founded upon an honest and reasonable view of believable evidence in

the case plus a conscientious and honest applying of the law as given to them by the judge.

Q. Should jurors give any effect to the fact that the judge denies a motion to dismiss at the close of the plaintiff's case or at the close of the whole case?

A. Jurors have no concern with such a matter. That is a question of law. They should not allow the disposition of it to affect their judgment on the facts one way or the other. If a motion to dismiss is denied, it merely means that the judge is of the opinion that there are disputed material questions of fact which should be decided by the jury, and that it is in the interest of both plaintiff and defendant that the jury should decide these questions of fact. The decision of the facts is the jury's duty, just as the stating of what the law is, is the exclusive function of the judge, which law the jury should not impair or weaken by failing to apply it to the facts as they decide them to be.

The foregoing are merely some of the elementary things that all jurors must know to enable them to be capable jurors. The jury system in the administration of justice is founded upon the idea that jurors are intelligent; that they are honest and that they will confine themselves to their own sphere of deciding the facts and conscientiously applying the law to the facts as it is given to them by the judge. It is founded upon the theory that they will decide the facts and apply the law without regard to who is the plaintiff or who is the defendant, whether it be a man, woman or corporation, in order that all persons, rich and poor alike may obtain an honest decision of their disputes with each other. The jury is bound as a matter of law to refrain from deciding any question of fact on a basis of sympathy or prejudice either in favor of or against any person or corporation. They are likewise bound not to permit sympathy, bias or prejudice to cause them to fail to apply the law, as it is given to them, to the facts. A jury's decision should be arrived at without regard to race, class, creed or color. It should represent truth. It will then be Justice, which is merely truth in action. The jury's action is in the form of a verdict, which means literally, "truly saying." That is, a jury's verdict is and should be the ascertained truth.

Jurors should realize that it is to their personal interest to see to it that the verdict registers the truth in the case they are deciding. This is important because jurors themselves may be forced at any time to come to court, as plaintiffs seeking to enforce rights or as defendants resisting claims asserted against them and they should conduct themselves as examples to the jurors whose intelligent, honest action they may perhaps, be required to rely upon for the enforcement or protection of their property rights or reputations or even their life and liberty.

Jurors who conform to the foregoing elementary requirements and the more detailed or specific instructions of the judge in his charge will be properly performing one of the loftiest functions given to any man to perform, that of doing justice between his fellowmen.

RUSSELL BENEDICT, STEPHEN CALLAGHAN, WILLIAM B. CARSWELL, JAMES C. CROPSEY, NORMAN S. DIKE, LEANDER B. FABER, LEWIS L. FAWCETT, WILLIAM F. HAGARTY, EDWARD LAZANSKY, HARRY E. LEWIS, JOHN MACCRATE, MITCHELL MAY, EDWARD RIEGELMANN, SELAH B. STRONG, JAMES C. VAN SICLEN, Supreme Court Justices, Second Judicial District—Trial Justices State of New York.

STATE AND LOCAL BAR ASSOCIATIONS

THE Bar Association of Arkansas held its twenty-eighth annual meeting at Hot Springs on May 28-29, at the New Arlington Hotel. Rev. C. E. Hickok of Hot Springs delivered the invocation. The address of welcome was delivered by Judge Earl Witt of that city, and the response was by Mr. T. J. Gaughan of Camden. The presidential address was delivered by President F. H. Mann of Forest City on "Chief Justice White."

At the afternoon session Judge Jacob Trieber of Little Rock read a paper, "A Review of the Act of Congress of February 13, 1925, Defining the Jurisdiction of the Circuit Courts of Appeals and of the Supreme Court." Judge Trieber stated, among other things, that the effect of the Act would be to relieve the Supreme Court of considerable litigation, but on the other hand it would add very much to the number of cases in the Circuit Courts of Appeal, increasing them more than twenty-five per cent in his opinion. In addition, considerable time of the circuit judges would be required in traveling to and from the states in their respective circuits to sit in cases requiring three judges, one of whom must be a circuit justice or circuit judge. In view of the crowded dockets of the Circuit Courts of Appeal at present he thought it would be necessary to increase the number of judges in every one of these courts, if a speedy disposition of the cases therein was to be had. The only other remedy in his opinion would be to limit the jurisdiction of this court to cases wherein the "Constitution or a statute or treaty of the United States is involved, and in all other civil cases wherein the value in controversy, exclusive of interest and costs, exceeds a certain sum, say $3,000, and in criminal cases when the offense charged is punishable by imprisonment for a term exceeding one year, or by death; in other words, in felonies, as defined in section 335 of the Criminal Code. (Section 10509 U. S. Comp. St.)"

Hon. James Hamilton Lewis of Chicago delivered an address on Friday, May 29, on the subject "America as the Author of the World's New International Law." It was followed by the reading, by W. H. Martin of Hot Springs, of the address delivered by Albert Pike before the meeting of the Arkansas Bar Association in 1839.

The afternoon session was devoted to reports of various committees and the election of officers. George B. Pugh of Little Rock was chosen President, T. J. Gaughan of Camden, Vice-President; J. Merrick Moore of Little Rock, Treasurer; Roscoe R. Lynn of Little Rock, Secretary. On the evening of May 28 there was a banquet at which Hal L. Norwood of Mena was the toastmaster, and Neill C. Marsh of El Dorado, W. L. McDonald of Little Rock, Mrs. Arthur Fairfax Triplett of Pine Bluff and H. T. Harrison of Little Rock were the speakers. Those in attendance agreed that on the whole the twenty-eighth had been an extraordinarily good meeting.

Illinois State Bar Association

The Forty-Ninth Annual Meeting of the Illinois State Bar Association convened on Thursday, May 28th, 1925, at the La Salle Hotel, Chicago. The meeting was called to order by President C. M. Clay Buntain of Kankakee, Illinois. The annual reports of the Secretary, Treasurer and Board of Governors were presented, and following this was the Annual Address of the President. The judges of Illinois were guests at an Acquaintance luncheon.

The afternoon of the first day was spent in receiving the reports of the Administrative, Legislative and General Committees. Judge Charles M. Thomson of the Appellate Court, First District, addressed the Judicial Section on "The Court and Publicity." Judge Warren H. Orr of Carthage, Illinois, addressed the County and Probate Judges Association of Illinois on "Recent Legislation and Decisions Affecting the County Court." In the evening there was a joint meeting of the Judicial

Section with the County and Probate Judges Association of Illinois. The proposed Canons of Judicial Ethics were discussed.

On the second and last day of the meeting Dr. William Draper Lewis of Philadelphia, Director of the American Law Institute, delivered a very fine address on "The Restatement of the American Common Law." Following this Mr. Vincent Gilroy of New York, an Arbitrator of the Arbitration Society of America, gave an interesting address on "Commercial Arbitration."

At the noon luncheon Mr. John Foster Dulles of New York, Secretary of the Hague-Peace Conference 1907, gave an interesting account of "The World Court." At the conclusion of his address, upon motion duly made, seconded and carried, the following resolution was adopted:

"Resolved that the Illinois State Bar Association joins in what it believes to be the wise judgment of the American people, that the United States ought to become one of the supporters of the Permanent Court of International Justice at The Hague, and that our Government therefore should adhere to the protocol establishing the Court, in the manner set forth by President Harding in his message to the Senate of the United States of February 24, 1923."

The entire afternoon session was given up to an open discussion of law enforcement and the lawyer; his duty; and is he living up to it? The discussion was led by Hon. Oscar E. Carlstrom, Attorney General, State of Illinois; Hon. Floyd E. Thompson, Judge Supreme Court of Illinois; Hon Marcus A. Kavanagh, Judge Superior Court, Cook County, and Hon. Jesse L. Deck of the Decatur bar. The addresses were all well considered.

The following were elected officers of the Association for the ensuing year:

President, John R. Montgomery, Chicago; First Vice-President, George H. Wilson, Quincy; Second Vice-President, Rush C. Butler, Chicago; Third Vice-President, Franklin L. Velde, Pekin; Secretary, R. Allan Stephens, Springfield; Treasurer, Frank L. Trutter, Springfield. The meeting then adjourned.

C. M. CLAY BUNTAIN.

Nevada Bar Association

The Nevada State Bar Association held its annual meeting in Reno on February 20 and 21. At that meeting Mr. George B. Thatcher delivered an address upon the subject of "The Development of Water Law in Nevada," and an invitation was accepted to attend the meeting of the California Bar Association to be held at Tahoe Tavern, Lake Tahoe, on September 3, 4 and 5. The Association also made various recommendations regarding proposed legislation to the legislature, which was then in session, and most of these recommendations were adopted. The following officers were elected for the ensuing year: Andrew L. Haight of Fallon, President; Robert M. Price of Reno, Vice-President; A. L. Scott of Pioche, Vice-President; E. L. Williams of Reno, Treasurer; John D. Hoyt of Reno, Secretary; Executive Committee—Andrew L. Haight, Sardis Summerfield, George S. Brown, George B. Thatcher and Gray Mashburn.

Iowa Meeting Program

The program of the thirty-first annual meeting of the Iowa State Bar Association, Dubuque, Iowa, June 18 and 19, includes an address of welcome by Louis G. Hurd of Dubuque and a response by Hon. E. W. Weeks of Guthrie Center; address, "Visit of the American Bar Association to London," by J. E. E. Markley, Mason City; presidential address, "The Work of the Lawyer," by President A. Hollingsworth, Keokuk; address, "The American Law Institute and Its Influence Upon the Administration of Justice," by Henry M. Bates, Dean of the Law School of the University of Michigan; annual address, "Centralization, National and International," by Sen. James A. Reed of Kansas City, Mo.; and the annual banquet on the evening of June 18, with A. Hollingsworth of Keokuk as the toastmaster, and Hon. F. D. Letts of Davenport, Hon. Frank Bonson of Dubuque, Mr. Frank Wisdom of Bedford and Hon. F. H. Helsel of Fort Dodge as the speakers.

Los Angeles Bar Officers

Newly elected officers of the Los Angeles Bar Association for the year 1925 are as follows: President, John G. Mott; Senior Vice-President, Eugene Overton; Junior Vice-President, Kemper Campbell; Treasurer, T. W. Robinson, and Secretary, R. H. F. Variel, Jr. Trustees are: Kenyon F. Lee, Hubert T. Moral, Julius P. Patrosso, Leonard B. Slosson, Nathan Newby and G. B. Crump. The retiring President, Robert M. Clarke, was presented with a bronze tablet in recognition of his services.

LETTERS ON TIMELY TOPICS

Jurisdiction of World Court

NEW YORK, May 27.—To the Editor: In the current number of the JOURNAL of the American Bar Association is given a summary of recent decisions of the World Court amongst which is that in the Mavrommatis case upon the merits. The really interesting feature about that case has somehow escaped special reference by any newspaper on this side of the Atlantic—in fact so far as I am aware, of any magazine, although some months ago your JOURNAL gave a summary of the decision on the jurisdictional points involved.

In substance the court holds that it is clothed with jurisdiction over a suit by an individual against a sovereign state, for that in effect was the claim sued upon by and in the name of the Greek government.

Whether that decision will result in further enlargement of jurisdiction awaits the outcome of the suit instituted by the Jewish Board of Deputies of London against the State of Hungary which is commented upon at page 200 of the May issue of Foreign Affairs (London).

BENJAMIN TUSKA.

His Darling Sin

Spokane, Washington.—To the Editor: For nearly forty years my business has been closely connected with banks and bankers; hence, I have gained to some extent the banker's viewpoint, relative to lawyers. Bankers with the great responsibility placed upon them, of safeguarding the interests of their stockholders and depositors, are naturally cautious, and in many cases timid. Bankers, as a general rule, have a high regard for the upright, conscientious lawyer, and are at all times ready to serve and recommend him to their customers.

The principal, and in fact about the only complaint of the Banker against the Lawyer, is PROCRASTINATION. The banker's books must be balanced and closed each day; he can not put off until tomorrow his work of today, even if he is required to work a great part of the night. How is it with us Lawyers? Do we not put off from day to day work that by a little extra exertion we could complete? Do we not often defer answering a letter until tomorrow, that we could manage to answer today? We are living in an age of activity. What the Banker wants, what the business man wants, what every client wants is action, service, promptness.

The lawyer is prone to procrastinate; in other words, put off until tomorrow which by a little exertion could be done today; if we are going to keep abreast of the times, if we are going to forge ahead, we must give service not tomorrow, but today. If the young lawyer will adopt this course, and render prompt service to the client, he will soon outdistance the old lawyer with longer experience and a more comprehensive knowledge of the law, but who procrastinates.

H. L. MCWILLIAMS,
Ex-President Spokane County Bar Association.

Dean Wigmore and the Senate

Cleveland, O., May 26.—To the Editor: Reading John H. Wigmore's letter in the May number of the JOURNAL compels one to wonder why Mr. Wigmore does not propose an amendment of the United States Constitution either to do away with the Senate entirely or else to change its position as a co-ordinate member of the Legislative Department so as to make its dissent immaterial when the House of Representatives and the President concur.

While about it one would like to know Mr. Wigmore's opinion as to the reason why the Constitution makes the Senate represent the states, while the House represents the people at large.

JOHN G. WHITE.